92-1271

Supreme Court, U.S.
FILED
JAN 26 1993
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUIS ANDRES ESQUIVEL-BERRIOS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

QUESTIONS PRESENTED

Petitioner, a Nicaraguan national, fled his country in 1985 at the age of twelve to avoid forced conscription into the military. He arrived in the United States and sought political asylum in 1988. The Board of Immigration Appeals took "administrative notice" that the intervening election of Violeta Chamorro as President of Nicaragua eliminated any well-founded fears of persecution that petitioner might have, and on that basis denied his asylum petition. The Board gave petitioner no opportunity to present evidence concerning the effect of the Chamorro election on his fear of persecution. The United States Court of Appeals for the Seventh Circuit affirmed.

The questions presented are:

1. Whether respondent violated petitioner's rights under the Due Process Clause of the Fifth Amendment by denying his asylum claim based solely upon administrative notice of adjudicative facts without prior notice and without giving petitioner the opportunity to present contrary evidence.

2. Whether 28 U.S.C. § 2347(c), which authorizes courts of appeals to order agencies to consider newly-adduced evidence, is rendered inapplicable by the existence of discretionary reopening mechanisms available at the agency level.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

A. Petitioner's Background 3

B. Asylum Proceedings And The Chamorro Election 4

C. Proceedings In The Court Of Appeals 6

REASONS FOR GRANTING THE PETITION 8

I. THE COURT OF APPEALS' DECISION THAT THE BOARD DID NOT VIOLATE THE DUE PROCESS CLAUSE CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND CANNOT BE RECONCILED WITH THIS COURT'S DUE PROCESS DECISIONS 9

A. The Court Of Appeals' Ruling Conflicts With Rulings Of Other Circuits That The Board May Not Base A Decision On Official Notice Without Warning And An Opportunity To Present Contrary Evidence 9

B. The Court Of Appeals' Ruling Conflicts With Decisions Of Other Circuits Which Hold That Discretionary Reopening Mechanisms Are Insufficient To Satisfy Due Process Requirements 16

II. THE COURT OF APPEALS' REFUSAL TO APPLY 28 U.S.C. § 2347 DISREGARDS THE PLAIN LANGUAGE OF THE STATUTE AND CONFLICTS WITH RULINGS OF OTHER COURTS OF APPEALS WHICH HAVE APPLIED IT ON REVIEW OF BOARD DECISIONS 22

III. THE QUESTIONS PRESENTED HAVE GREAT LEGAL AND PRACTICAL SIGNIFICANCE 25

CONCLUSION 26

TABLE OF AUTHORITIES

Cases — Page

Banks v. Schweiker, 654 F.2d 637 (9th Cir. 1981) 14

Barraza Rivera v. I.N.S., 913 F.2d 1443 (9th Cir. 1990) 11

Becerra-Jimenez v. I.N.S., 829 F.2d 996 (10th Cir. 1987) 24, 25

Bernal-Garcia v. I.N.S., 852 F.2d 144 (5th Cir. 1988) 24

Board of Education v. Allen, 392 U.S. 236 (1968) 9

Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281 (1974) 13, 14, 19

Brown v. Piper, 91 U.S. 37 (1875) 10

Castillo-Villagra v. I.N.S., 972 F.2d 1017 (9th Cir. 1992) . . . . . *passim*

The Chicago Junction Case, 264 U.S. 258 (1924) 13

Coriolan v. I.N.S., 559 F.2d 993 (5th Cir. 1977) 24

Dolores v. I.N.S., 772 F.2d 223 (6th Cir. 1985) 24

Evans v. Newton, 382 U.S. 296 (1966) 10

Ford Motor Co. v. Labor Board, 305 U.S. 364 (1939) . 25

Gutierrez-Rogue v. I.N.S., 954 F.2d 769 (D.C. Cir. 1992) 10, 12, 16, 21

Heckler v. Campbell, 461 U.S. 458 (1983) 14

I.N.S. v. Abudu, 485 U.S. 94 (1988) 17, 18, 21

I.N.S. v. Doherty, 112 S. Ct. 719 (1992) . . . . . *passim*

I.N.S. v. Elias-Zacarias, 112 S. Ct. 812 (1992) 21

I.N.S. v. Jong Ha Wang, 450 U.S. 139 (1981) 17

I.N.S. v. Phinpathya, 464 U.S. 183 (1984) 17

I.N.S. v. Rios-Pineda, 471 U.S. 444 (1985) 17

Interstate Commerce Comm'n v. Louisville & Nashville R.R., 227 U.S. 88 (1913) 13

Johnson v. Eisentrager, 339 U.S. 763 (1950) 12

Kaczmarczyk v. I.N.S., 933 F.2d 588 (7th Cir.), *cert. denied*, 112 S. Ct. 583 (1991) . . 11, 16, 20, 21

Landon v. Plasencia, 459 U.S. 21 (1982) 12

Martinez de Mendoza v. I.N.S., 567 F.2d 1222 (3d Cir. 1977) 23, 24, 25

Milliken v. Bradley, 433 U.S. 267 (1977) 19, 20

Montecino v. I.N.S., 915 F.2d 518 (9th Cir. 1990) 11

Mutual Life Ins. Co. v. McGrew, 188 U.S. 291 (1903) . 13

Ohio Bell Telephone Co. v. Public Utilities Comm'n,
301 U.S. 292 (1937) 12, 13, 14

Orantes-Hernandez v. Smith, 541 F. Supp. 351
(C.D. Cal. 1982) 11

Osaghae v. I.N.S., 942 F.2d 1160 (7th Cir. 1991) 23

Ramirez-Gonzalez v. I.N.S., 695 F.2d 1208
(9th Cir. 1983) 25

Rivera-Cruz v. I.N.S., 948 F.2d 962
(5th Cir. 1991) 10, 12, 16

Speiser v. Randall, 357 U.S. 513 (1958) 16

Standard-Vacuum Oil Co. v. United States,
339 U.S. 157 (1950) 9

Ulloa v. I.N.S., 944 F.2d 905
(6th Cir. 1991) (Table),
at App. 27a-30a, *infra* . . . . . *passim*

United States v. Abilene & So. Ry.,
265 U.S. 274 (1924) 13, 14

United States v. B. & O. Southwestern Ry.,
226 U.S. 14 (1912) 13

Witherspoon v. Illinois, 391 U.S. 510 (1968) 9

Statutes, Rules and Regulations — Page

5 U.S.C. § 556(e) 14

8 U.S.C.
§ 1105a 24
§ 1158(a) 9

28 U.S.C. § 2347(c) . . . . . *passim*

8 C.F.R. § 3.2 . . . . . 16, 17, 23, 24, 25

Geneva Convention Relating to the Protection of Victims of Non-International Armed Conflicts, Protocol II, 16 I.L.M. 1442 (1977) 3

United Nations Convention on the Rights of the Child, 28 I.L.M. 1448 (1989) 3

FED. R. EVID. 201(e) Advisory Comm. Note 14

Constitutional Provisions

U.S. Const. Amend. V . . . . . *passim*

Miscellaneous — Page

3 K. Davis, ADMINISTRATIVE LAW TREATISE (2d ed. 1980) 11, 14, 20

Davis, *A System of Judicial Notice Based On Fairness and Convenience*, in PERSPECTIVES OF LAW 69 (1964) 14

Immigration Board's Administrative Notice of Sandinista Ouster Yields Circuit Split, 61 U.S.L.W. 1023 (Aug. 18, 1992) 3, 26

69 INTERPRETER RELEASES 1213 (Sept. 28, 1992) 3, 15, 26

Joint Comm. on Foreign Affairs, *Country Reports on Human Rights Practices for 1984*, S. Prt. No. 6, 99th Cong., 1st Sess. (1985) 3

Joint Comm. on Foreign Affairs, *Country Reports on Human Rights Practices for 1988*, S. Prt. No. 3, 101st Cong., 1st Sess. (1989) 4

Joint Comm. on Foreign Affairs, *Country Reports on Human Rights Practices for 1990*, S. Prt. No. 5, 102d Cong, 1st Sess. (1991) 5

Sen. Comm. on Foreign Relations, *Nicaragua Today*, Comm. Prt. No. 102, 102d Cong., 2d Sess. (1992) . . 5

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUIS ANDRES ESQUIVEL-BERRIOS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Luis Andres Esquivel-Berrios respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, as modified on denial of rehearing (App. 1a-21a, *infra*), is reported at 971 F.2d 26. The decision of the United States Board of Immigration Appeals (App. 22a-26a, *infra*) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1992. A timely petition for rehearing with suggestion of rehearing *en banc* was filed by petitioner on September 15, 1992. The court of appeals modified its judgment and denied the petition on November 4, 1992. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person shall be * * * deprived of life, liberty, or property, without due process of law." 28 U.S.C. § 2347(c) is reprinted at page 31a of the Appendix to this petition.

STATEMENT

In this case, the United States Court of Appeals for the Seventh Circuit upheld the determination by the Board of Immigration Appeals ("Board") that petitioner no longer had a well-founded fear of persecution were he to return to his native Nicaragua. That determination was based entirely on the Board's "administrative notice" that a change in the government of Nicaragua removed any basis for petitioner's fear of persecution. The Board did not give petitioner any notice that it intended to take "administrative notice" of the effect of the change in government, and did not give petitioner any opportunity to present evidence demonstrating that the change in government did not eliminate Sandinista control of the Nicaraguan military and security forces and thus did not remove the basis for his fear of persecution.

The Seventh Circuit's decision that petitioner's due process rights were not violated by the Board's use of official notice and the lack of any opportunity for petitioner to rebut the

noticed "facts" follows similar decisions by the District of Columbia Circuit and the Fifth Circuit, but is directly contrary to decisions of the Sixth Circuit and the Ninth Circuit.[1] This Court should grant the petition to resolve this conflict among the circuits on this important issue.

A. Petitioner's Background. Petitioner Luis Esquivel-Berrios was born in Chinandega, Nicaragua in 1971. In February, 1985, at the age of thirteen, he fled Nicaragua and left behind his family out of fear that he would be forcibly conscripted into military service by the Sandinista government. Shortly before his escape, the Sandinistas conducted a raid on petitioner's village in which more than 3,000 children and young adults (8% of the village's population) were kidnapped and forced into military service against their will.[2] Petitioner testified that children of his age and size were particularly at risk of being kidnapped.[3]

---

[1] See *Immigration Board's Administrative Notice Of Sandinista Ouster Yields Circuit Split*, 61 USLW 1023 (Aug. 18, 1992) (noting conflict among the circuits following ruling below); 69 INTERPRETER RELEASES 1213 (Sept. 28, 1992) (same).

[2] This raid was specifically described in the State Department's *Country Reports for 1984* (published in February, 1985), a copy of which was contained in the record. See Joint Comm. on Foreign Affairs, *Country Reports on Human Rights Practices for 1984*, S. Prt. No. 6, 99th Cong., 1st Sess. 615 (1985).

[3] It was undisputed below that such forced conscription by the Sandinistas constituted a violation of international law, including Article 4(3)(c) of Protocol II to the Geneva Convention Relating To The Protection Of Victims Of Non-International Armed Conflicts, 16 I.L.M. 1442, 1444 (1977), and Article 38 of the United Nations Convention on the Rights of the Child, 28 I.L.M. 1448, 1470 (1989).

Petitioner fled to Guatemala where he remained for more than three years while living with an older brother. He eventually lost his permission to remain in Guatemala and, fearing deportation back to Nicaragua, entered the United States without inspection and was immediately arrested on or about July 21, 1988. Upon his arrest, petitioner conceded deportability and applied for political asylum citing his fear of reprisals by the Sandinista military and his opposition to the Sandinista party. Through the time of his arrest, the State Department continued to acknowledge the forced conscription of minors by the Sandinista military and the disappearance of those who refused to serve.[4]

B. Asylum Proceedings And The Chamorro Election. The Immigration Judge found petitioner's testimony concerning his experiences and fears of persecution to be credible. Nevertheless, the judge denied petitioner's asylum claim citing the absence of sufficient corroborating evidence. The judge ruled, however, that he would not consider any evidence contained in the State Department's *Country Reports* even though such reports had been placed into the record and specifically corroborated petitioner's testimony.

On April 25, 1990, during the pendency of petitioner's appeal to the Board and after all briefing was completed, Violeta Chamorro defeated the Sandinistas in a general election and was elected President of Nicaragua. The State Department, however, was quick to point out that the Sandinistas retained much of their official control of the government and that the same Sandinista officials who controlled the military and

---

[4] See, *e.g.*, Joint Comm. on Foreign Affairs, *Country Reports on Human Rights Practices for 1988*, S. Prt. No. 3, 101st Cong., 1st Sess. 645 (1989).

security forces in 1985 remained in power.[5] Recently, the Senate Foreign Relations Committee also noted that Sandinista control of the government is growing and that the Sandinista military continues to perpetrate human rights atrocities and persecute its opponents.[6]

On January 17, 1991, the Board dismissed petitioner's appeal based entirely upon its officially noticed assumption that the Chamorro election had necessarily eliminated any well-founded fear of persecution that petitioner might have. In doing so, the Board utilized the following boilerplate language that it has used to dismiss virtually all Nicaraguan asylum petitions:

> [W]e take administrative notice that the Sandinista party no longer controls the Nicaraguan government. Effective April 25, 1990, a new coalition government, formed by parties in

---

[5] See Joint Comm. on Foreign Affairs, *Country Reports on Human Rights Practices for 1990*, S. Prt. No. 5, 102d Cong, 1st Sess. 701 (1991) ("The military and police continued to be controlled by Sandinistas in 1990 despite the change in administration. In transition accords signed between the new Government and outgoing Sandinista leaders, Humberto Ortega [brother of former President Daniel Ortega] was designated to remain as head of the Nicaraguan armed forces . . . . Ortega retains almost complete autonomy in the conduct of military affairs. Rene Vivas, also a Sandinista, remained as head of the police").

[6] See Sen. Comm. on Foreign Relations, *Nicaragua Today*, Comm. Prt. 102, 102d Cong., 2d Sess. 1-6, 35-49, 79-95 (Aug. 1992). Among its "Key Findings," the Foreign Relations Committee concluded that "President Chamorro is the titular head of state in Nicaragua. The country is actually controlled by General Humberto Ortega, and the Sandinista National Liberation Front," and that "[h]uman rights abuses are rampant in Nicaragua. Typical examples are the murder of Nicaraguan Resistance Commander, Enrique Bermúdez, the torture of Resistance leader Aristides Sánchez, the murder of Jean Paul Genie [a sixteen year old boy who returned to Nicaragua after fleeing conscription], the assassination, torture, and harassment of thousands of former Resistance combatants . . ." *Id.* at ix-x.

> opposition to the Sandinistas ("UNO"), has succeeded the former government of the Sandinista party following national elections and the inauguration of Violeta Chamorro as the new president. Further, the new president of Nicaragua has announced a general amnesty covering the hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription. Given that the Sandinista party no longer governs Nicaragua, under the present circumstances we do not find that the record now before us supports a finding that the respondent has a well-founded fear of persecution by the Sandinista government were he to return to Nicaragua.

App. 23a-24a, *infra*. The Board did not address petitioner's evidence concerning his fears of persecution by the Sandinista military. In fact, the Board's opinion contained no discussion *at all* concerning petitioner's specific asylum claim. Instead, because of its officially noticed findings concerning the impact of the Chamorro election, the Board simply held that petitioner's evidence of persecution was inconsequential: "even if one were to assume that the respondent's previous experiences in Nicaragua amounted to past persecution, or that at the time he left and for some time thereafter he had a well-founded fear of persecution should he return, it is not established that he presently merits a grant of asylum." App. 24a, *infra*.

C. Proceedings In The Court Of Appeals. On March 14, 1991, petitioner filed a timely petition for review in the Court of Appeals for the Seventh Circuit seeking to reverse the Board's ruling on the grounds that it violated his rights under the Due Process Clause and because the Board's officially noticed findings were not supported by substantial evidence. Alternatively, pursuant to 28 U.S.C. § 2347(c), petitioner sought an order vacating the Board's ruling and remanding for consideration of newly-adduced evidence which petitioner sought to offer to rebut the Board's findings. Petitioner argued that he had reasonable grounds for not presenting this evidence

to the Board because the Chamorro election did not occur until after briefing at the Board had concluded and because he was given no warning by the Board that it would rely upon matters outside the record.

On August 4, 1992, the court of appeals, while acknowledging the seriousness of petitioner's constitutional objections to the Board's decision, nevertheless rejected each of his contentions. The court initially noted its concern over the "cloud cast over the Board's decision by its use of boilerplate paragraphs in describing the salient factors involved in its determination." App. 18a, *infra*. The court then cited the absence of any "detailed description of Berrios' testimony" and its concern that it was not "immediately apparent that the Board considered Berrios' evidence at all." *Ibid.* The court also acknowledged that "the Board did not discuss the relationship between the change in the Nicaraguan government and Berrios' particular claims." *Ibid.*

Despite each of these deficiencies in the Board's decision, the court held that "the Board's consideration of Berrios' case was not so inadequate as to amount to a denial of due process" because one sentence in the decision "indicates that the Board was aware of Berrios' specific claim." App. 18a, *infra*. The court did not hold the Board's officially noticed findings to be supported by substantial evidence. Instead, it affirmed the Board's decision based upon the mere holding that the evidence cited by the Board "tends to support a conclusion that Berrios no longer had a well-founded fear of persecution." *Id.* at 19a n.12.

Finally, the court denied petitioner's motion pursuant to 28 U.S.C. § 2347(c) on the grounds that such relief was inapplicable given the availability of discretionary reopening mechanisms at the Board. App. 16a-17a, 19a, *infra*. While the court agreed with petitioner that he "has a due process right to

have [his] evidence considered," *id.* at 19a, the court assumed that such evidence would be considered by the Board through a motion to reopen. It also assumed that even though a motion to reopen would not stay petitioner's deportation, the Board would act in good faith and not deport petitioner until such a motion was resolved (although respondent's counsel refused to provide such assurances during oral argument in the court of appeals).

On September 15, 1992, petitioner filed a petition for rehearing and suggestion of rehearing *en banc*, citing primarily the conflict created by the court's decision with recent rulings of the Sixth and Ninth Circuits. While acknowledging the conflict concerning each of its holdings (App. 14a, 17a n.9, *infra*), the court denied the petition for rehearing on November 4, 1992. On December 4, 1992, the court of appeals stayed execution of its judgment enforcing the administrative order of the Board pending disposition of the petition to this Court.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision on the constitutional limits and uses of official notice, including its holding that due process does not guarantee an opportunity to rebut officially noticed findings, conflicts with decisions of several other circuits and cannot be reconciled with due process decisions of this Court. In addition, the Seventh Circuit's ruling on the applicability of 28 U.S.C. § 2347(c) also presents a question over which the courts of appeals are in conflict. These issues are certain to recur given the broad applicability of the court's decision to virtually all forms of agency adjudication. This Court should grant the petition to resolve these conflicts among the circuits.

I. THE COURT OF APPEALS' DECISION THAT THE BOARD DID NOT VIOLATE THE DUE PROCESS CLAUSE CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND CANNOT BE RECONCILED WITH THIS COURT'S DUE PROCESS DECISIONS

The court of appeals' decision in this case raises fundamental questions concerning the constitutional limits of official notice and the due process safeguards that must be observed when such notice is taken by an agency. It also calls into question the role, if any, that agency reopening mechanisms may play in providing these safeguards. On each of these fundamental questions, the courts of appeals are hopelessly in conflict and in need of guidance from this Court.

A. The Court Of Appeals' Ruling Conflicts With Rulings Of Other Circuits That The Board May Not Base A Decision On Official Notice Without Warning And An Opportunity To Present Contrary Evidence

The court of appeals held that the Board may constitutionally deny an asylum application based solely upon official notice of changed political circumstances in the alien's country of origin. App. 18a-19a, *infra*. In other words, the Board may take official notice that an alien no longer possesses the well-founded fear of persecution required by 8 U.S.C. § 1158(a) to merit a grant of asylum.[7] Most significantly, however, the

---

[7] Although not presented for review, this holding cannot be squared with the rule that official notice not be used to resolve ultimate issues in a case, particularly those which involve the petitioner's state of mind. See, *e.g.*, *Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157, 159-60 (1950) ("certainly a court could not know judicially the facts of petitioner's information or lack of information"); *Board of Education v. Allen*, 392 U.S. 236, 248 (1968) (refusing to take judicial notice of whether materials used in parochial schools are used solely to teach religion); *Witherspoon v. Illinois*, 391 U.S. 510, 517-18 (1968) (refusing to take judicial notice that exclusion

court also held that the Board could take official notice without warning to the alien and without guaranteeing him the opportunity to present rebuttal evidence. App. 18a-19a, *infra*. In reaching this holding, the court of appeals fully acknowledged the conflict among the circuits on this question. *Id.* at 14a. Indeed, when faced with this conflict on rehearing, the court cited but made no attempt to reconcile it. *Ibid.*

The court of appeals based much of its reasoning on earlier decisions of the District of Columbia Circuit in *Gutierrez-Rogue v. I.N.S.*, 954 F.2d 769 (1992), and the Fifth Circuit in *Rivera-Cruz v. I.N.S.*, 948 F.2d 723 (1991). In each of these cases, the courts upheld the ability of the Board to deny Nicaraguan asylum applications based solely on official notice as to the impact of the Chamorro election. These decisions, however, irreconcilably conflict with rulings of the Ninth Circuit in *Castillo-Villagra v. I.N.S.*, 972 F.2d 1017 (1992), and the Sixth Circuit in *Ulloa v. I.N.S.*, 944 F.2d 905 (1991) (Table), at App. 27a-30a, *infra*, which held that the Board's boilerplate use of officially noticed findings concerning the election violated the Due Process Clause, both because of the absence of any warning to the petitioner and the failure to provide the petitioner an opportunity to present evidence rebutting those findings.[8]

---

of jurors opposed to capital punishment increases risk of conviction); *Evans v. Newton*, 382 U.S. 296, 301 (1966) (refusing to take judicial notice of whether park was public or private in character). See also generally *Brown v. Piper*, 91 U.S. 37, 42-43 (1875) ("[c]ourts will take notice of whatever is generally known within its limits of their jurisdiction. . . . This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative").

[8] The court's decision to uphold the Board's ruling even though it "did not discuss the relationship between the change in the Nicaraguan government and Berrios' particular claims," App. 18a, *infra*, also is unprecedented.

The issue presented is *not* whether the Board may take official notice in asylum cases of changed political circumstances. The power of agencies to take such official notice where the salient facts are commonly acknowledged and uncontroverted is well-recognized and an indispensable component of agency adjudication.[9] Instead, the question presented relates solely to the power of the Board to base a decision entirely on official notice of such issues without warning to the petitioner and without affording him or her the opportunity to present rebuttal evidence. The Board's abuse of its powers of official notice in such cases was well described by the Ninth Circuit in *Castillo-Villagra*:

> The facts of which the INS took notice in this case were in part legislative in nature. They included: (1) that Violeta Chamorro had been elected president, (2) that her non-Sandinista coalition had gained a majority in parliament, and (3) that the Sandinistas were ousted from power.

Indeed, it has been well-settled that the Board may not base a decision entirely on official notice without tying those facts to the specific circumstances of the asylum claim in each case. See, *e.g.*, *Montecino v. I.N.S.*, 915 F.2d 518, 521 n.1 (9th Cir. 1990) (Board violated Due Process Clause where decision was "the kind of perfunctory form letter that might be used by a department store dismissing a customer's mistaken complaint of an overcharge"); *Barraza Rivera v. I.N.S.*, 913 F.2d 1443, 1448 (9th Cir. 1990) (same); *Kaczmarczyk v. I.N.S.*, 933 F.2d 588, 594-95 (7th Cir.), *cert. denied*, 112 S.Ct. 583 (1991) (official notice not a "substitute for an analysis of the facts of each applicant's individual circumstances").

[9] See, *e.g.*, *Kaczmarczyk v. I.N.S.*, 933 F.2d 588, 594 (7th Cir. 1991) (recognizing power of board to take official notice of "uncontroverted facts concerning political conditions in asylum seekers' home countries"); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 358 n.8 (C.D. Cal. 1982) ("[t]he Court's power to take judicial notice of grave conditions in other countries where all pertinent reports disclose similar accounts is well-established"). See also generally 3 K. Davis, ADMINISTRATIVE LAW TREATISE § 15:18, at 200 (2d ed. 1980) (same).

> The facts were also in part adjudicative, that [petitioners] had nothing more to fear from the Sandinistas. The first two facts are plainly legislative and not debatable. It would be a waste of time to allow evidence regarding them. The third legislative fact, that the Sandinistas were ousted from power, was debatable, since the Sandinistas retained power over the police and the military. The adjudicative fact required both a debatable assumption about the amount of power retained by the Sandinistas, and an assumption about the particular salience [to the petitioners].

Castillo-Villagra, 972 F.2d at 1027.

As this case and *Castillo* demonstrate, there exists a fundamental conflict among the circuits regarding the Board's duty to warn of its intention to base a decision entirely on official notice and to guarantee the petitioner an opportunity to offer rebuttal evidence. In this case, the court of appeals held that due process requires neither of these safeguards and is satisfied by the petitioner's ability to seek discretionary reopening remedies at the Board. App. 14a-15a, 18a, *infra*. Accord *Gutierrez-Rogue v. I.N.S.*, 954 F.2d 769 (D.C. Cir. 1991); *Rivera-Cruz v. I.N.S.*, 948 F.2d 962 (5th Cir. 1992). This holding, however, squarely conflicts with decisions of other circuits and cannot be reconciled with this Court's due process jurisprudence.

It is well established that aliens are fully entitled to the protections of the Due Process Clause of the Fifth Amendment, including the right to notice and an opportunity to present evidence in deportation proceedings. *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950). In construing the Due Process Clause, this Court has warned that agencies may not decide matters solely through official notice of facts outside the record without warning to the parties. In *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937), this Court, following a long

line of rulings by this Court concerning the constitutional limits of official notice[10], held that plenary use of officially noticed findings by an agency without warning to the parties violates the Due Process Clause. In *Ohio Bell*, the agency adjudicated the parties' claims by taking official notice of key disputed facts in the case "[w]ithout warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted." *Id.* at 300. This Court struck down such use of official notice, holding that "[t]his is not the fair hearing essential to due process. It is condemnation without trial." *Ibid.*

The constitutional rule which has evolved from *Ohio Bell* and its predecessors was summarized in *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281 (1974):

---

[10] See, *e.g.*, *United States v. Abilene & So. Ry.*, 265 U.S. 274, 289 (1924) (Brandeis, J.) (official notice violated Due Process Clause because petitioners "were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties"); *The Chicago Junction Case*, 264 U.S. 258, 265 (1924) (Brandeis, J.) (same); *Interstate Commerce Comm'n v. Louisville & Nashville R.R.*, 227 U.S. 88, 93 (1913) ("[a]ll parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense"); *United States v. B. & O. Southwestern Ry.*, 226 U.S. 14, 20 (1912) (Holmes, J.) ("[i]t would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them"); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 312 (1903) ("the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them").

> A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, *the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.*

Id. at 288 n.4 (emphasis added), citing *Ohio Bell*, 301 U.S. at 300; *Abilene*, 265 U.S. at 289. *Cf. Heckler v. Campbell*, 461 U.S. 458, 469 (1983) ("when an agency takes official or administrative notice of facts, a litigant must be given an adequate opportunity to respond").

Following these decisions, the Sixth and Ninth Circuits have each held that where the Board bases a decision entirely on official notice, "it is essential that the parties be afforded an opportunity to present information 'which might bear upon the propriety of noticing the fact, or upon the truth of the matter to be noticed.'" *Castillo-Villagra*, 972 F.2d at 1028 (quoting *Banks v. Schweiker*, 654 F.2d 637, 641 (9th Cir. 1981)). Accord *Ulloa v. I.N.S.*, 944 F.2d 905 (6th Cir. 1991) (Table), at App. 29a-30a, *infra* ("We believe . . . notions of fairness require that the Board give aliens adequate notice and a meaningful opportunity to respond to officially noticed facts that bear upon the Board's decision-making process").[11] Thus, in

---

[11] See also 3 K. Davis, ADMINISTRATIVE LAW TREATISE § 15:16, at 195-96 (2d ed. 1980) ("when [officially noticed] facts . . . could be reasonably challenged and they importantly affect the decision, giving the parties a pre-decision chance to respond to them may be an essential part of fair procedure"); Davis, *A System of Judicial Notice Based On Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 76-77 (1964). *Cf.* Administrative Procedure Act, 5 U.S.C. § 556(e) (when agency rests decision on official notice, party must be given "on timely request . . . an opportunity to show the contrary"); Advisory Comm. Notes to FED. R. EVID. 201(e) ("[b]asic considerations of procedural fairness *demand* an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter

sharp conflict with the Fifth, Seventh and District of Columbia Circuits, these Courts have each specifically held in identical cases that the Board should have warned aliens of its intention to rely upon officially noticed findings concerning the Chamorro election as the basis for its decision and given them the opportunity to present rebuttal evidence:

> The agency should have warned that it would consider these facts even though they were not in existence at the time of the hearing and appellate briefs, so that the parties could have moved for leave to supplement their briefs, supplement the evidence, withdraw their applications for asylum, or seek other relief. The agency should also have warned, prior to final decision, that it intended to take notice that the Sandinistas were out of power, and that any well-founded fear of persecution the applicants might have had before the election could no longer be well founded, and then given the parties an opportunity to show cause why notice should not be taken of these propositions. . . . To deny an opportunity to be heard in these circumstances was a denial of Due Process required by the Fifth Amendment.

Castillo-Villagra, 972 F.2d at 1029.[12] Accord *Ulloa v. I.N.S.*, 944 F.2d 905 (6th Cir. 1991) (Table), at App. 30a, *infra* (vacating and remanding Board's decision "so that petitioner

---

noticed. The rule *requires* the granting of that opportunity upon request") (emphasis added).

[12] See also 69 INTERPRETER RELEASES 1213, 1216 (Sept. 28, 1992) ("We find the approach in *Castillo-Villagra* to be the better one. . . . Given the high stakes involved in asylum cases, applicants should be afforded a hearing on the alleged political changes that the BIA takes notice of en route to denying an asylum claim. Political changes by themselves do not necessarily render an applicant's asylum application moot. As the State Department's *Country Reports* point out, the Sandinistas still retain considerable influence in the Nicaraguan security forces, and this is a factor that should be considered in the context of an individual's asylum claim").

may offer rebuttal evidence regarding the change of governments in Nicaragua and STAY[ing] the order of deportation until the evidence has been considered by the Board"). The procedural unfairness involved in this case strikes at the core of due process guarantees since "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357 U.S. 513, 520 (1958). What is more, it is readily apparent that the controversy concerning these fundamental issues cannot be reconciled without guidance from this Court.

B. The Court Of Appeals' Ruling Conflicts With Decisions Of Other Circuits Which Hold That Discretionary Reopening Mechanisms Are Insufficient To Satisfy Due Process Requirements

There is no dispute that aliens are constitutionally guaranteed the right to rebut officially noticed findings and "to have this evidence considered." App. 19a, *infra*. The court of appeals, however, like several other circuits, held that these constitutional guarantees are satisfied by the alien's ability to file a motion to reopen at the Board pursuant to 8 C.F.R. § 3.2. It is here that the circuits are again in conflict. Indeed, the court of appeals' holding on this point reflects a serious misunderstanding of the limited and discretionary nature of motions to reopen. Because of these characteristics, motions to reopen cannot provide any constitutional guarantees whatsoever.

The court of appeals' decision depends critically upon the assumption that the filing of motion to reopen before the Board "allow[s] asylum petitioners an opportunity to introduce evidence rebutting officially noticed facts." App. 14a, *infra*, quoting *Kaczmarczyk*, 933 F.2d at 597. Accord *Gutierrez-Rogue*, 954 F.2d at 773 (D.C. Cir. 1992); *Rivera-Cruz*, 948 F.2d at 968 (5th Cir. 1992). *Contra Castillo-Villagra*, 972

F.2d at 1029 (9th Cir. 1992); *Ulloa*, 944 F.2d 905 (6th Cir. 1991) (Table), at App. 30a n.1, *infra*. This conjecture depends in turn upon the incorrect presumption that aliens have a *right* to present evidence as part of a motion to reopen. In fact, as this Court explained recently in *I.N.S. v. Doherty*, 112 S. Ct. 719 (1992), the reopening mechanisms contained in 8 C.F.R. § 3.2 afford no such right.

Section 3.2 provides, in relevant part, that "[m]otions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . ." The language of Section 3.2 reveals that a motion to reopen does not automatically entitle the movant to consideration of new evidence. To the contrary, it is framed in negative terms such that the Board is *never* absolutely required to reopen proceedings and consider new evidence:

> [Section 3.2] is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened.

I.N.S. v. Abudu, 485 U.S. 94, 105 (1988), quoting *I.N.S. v. Jong Ha Wang*, 450 U.S. 139, 144 n.5 (1981). Accord *Doherty*, 112 S. Ct. at 724 (same). In short, "the BIA has discretion to deny a motion to reopen even if the alien has made out a prima facie case for relief." *Abudu*, 485 U.S. at 105-106, citing *I.N.S. v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *I.N.S. v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984).

The Board need not consider newly adduced evidence at all before denying reopening. For example, the Board "may hold

that the movant has not established a prima facie case for the underlying substantive relief sought." *Abudu*, 485 U.S. at 104. The Board also "may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/ reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief." *Id.* at 105. Thus, the court of appeals' assumption that evidence offered to rebut officially noticed findings actually will be considered by the Board through a motion to reopen cannot be squared with this Court's rulings that the Board always retains the discretion to deny reopening regardless of the new evidence being presented.

The court of appeals' reliance on reopening mechanisms also cannot be reconciled with this Court's decisions because of the strong disfavor with which such motions are viewed. In *Abudu*, this Court explained that "[t]he appropriate analogy [for a motion to reopen] is a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden." 485 U.S. at 110. Consequently, motions to reopen are highly disfavored:

> [m]otions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing, and motions for a new trial on the basis of newly discovered evidence. . . . This is especially true in a deportation proceeding where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.

Doherty, 112 S. Ct. at 724-25.

For these very reasons, the Sixth and Ninth Circuits have rejected the view of the Fifth, Seventh and District of Columbia Circuits that reopening mechanisms provide the sort of meaningful opportunity to be heard required by the Due Process

Clause. To begin, given petitioner's indisputable constitutional right to have his evidence considered by the Board, that right cannot be conditioned on his ability to convince the Board to reopen its proceedings. See *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 288 n.4 (1974) ("the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation"). Indeed, "requiring a petitioner facing deportation to file a motion to reopen the proceedings in order to rebut officially noticed facts creates an unnecessary procedural hurdle for such a petitioner." *Ulloa*, at App. 30a n.1, *infra*. This is particularly so in cases such as this where the Board itself is solely responsible for the petitioner's predicament:

> Petitioner[] did not bypass the INS. The INS bypassed [him], by taking administrative notice of facts not at issue in the hearings. Usually in a motion to reopen, the movant seeks to inject new material, but in this case, the tribunal injected the new material after the hearing was over.

Castillo-Villagra, 972 F.2d at 1024.

In short, following *Abudu* and *Doherty*, it is clear that discretionary reopening mechanisms cannot provide a constitutionally adequate method of assuring that evidence offered to rebut officially noticed findings will be considered. As recognized by the Sixth and Ninth Circuits, if the Board denies the motion to reopen, petitioner's evidence will never be considered by the Board at all.

> The BIA decision was made on the basis of facts which were not the subject of the hearing before the IJ. *That means that, with respect to the facts which controlled the BIA decision, the petitioners have never had a hearing. The motion to reopen is discretionary. If it were denied, the petitioners would never obtain a hearing on the matters which were determinative for the BIA.* The effect of requiring a motion to reopen . . . may amount, in practical

> consequences, to denial of any hearing. . . . The alien does not have a right to reopen, only a right to ask for reopening, and the motion is disfavored and addressed to the discretion of the agency.

Castillo-Villagra, 972 F.2d at 1025 (emphasis added) (citing *Abudu* and *Doherty*).

Yet, even if one could assume that Board always would consider evidence offered to rebut officially noticed findings through a motion to reopen, that still would not reconcile the conflict concerning these issues. In *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (citation omitted), this Court held that remedies for constitutional violations must be "designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" Thus, where due process requires that a petitioner be afforded the opportunity to rebut officially noticed findings, his procedural interest must be "as fully protected as it would have been by introducing the noticed facts as a part of the evidence at the original hearing." K. Davis, ADMINISTRATIVE LAW TREATISE, § 15:18 at 201 (2d ed. 1980). Yet, a motion to reopen cannot place the alien in the same position he or she would have been in if the issues raised in the motion had been adjudicated originally.

Limiting the alien to reopening mechanisms places the alien at a substantial disadvantage because the filing of a motion to reopen does not stay the alien's deportation, leaving open "the possibility that unsuccessful asylum applicants may be ordered to leave the country before the Board has ruled on their motions to reopen." App. 17a n.11, *infra*, quoting *Kaczmarczyk*, 933 F.2d at 597. The Seventh Circuit addressed this problem by simply *assuming* that "when an asylum applicant uses a good faith motion to reopen to dispute officially noticed facts, the Board will exercise its discretion to stay the execution of its decision until it has had an opportunity to rule on the

applicant's motion." *Ibid.*, quoting *Kaczmarczyk*, 933 F.2d at 597. Accord *Gutierrez-Rogue*, 954 F.2d at 773 (adopting same presumption). The Ninth and Sixth Circuits, however, have correctly been unwilling to take this leap of faith:

> We are not satisfied that we can make this presumption, in view of the "broad discretion" the agency has to deny motions for rehearing, which are "disfavored."

Castillo-Villagra, 972 F.2d at 1030, quoting *Doherty*. Accord *Ulloa*, at App. 30a n.1, *infra* ("[t]he filing of a motion to reopen does not serve to stay the execution of an order of deportation . . . and thus such a procedure imposes the unreasonable risk that a petitioner may be deported before the Board considers the rebuttal evidence contained in his motion to reopen"). Applying the rule in *Milliken*, reopening mechanisms are therefore constitutionally insufficient because they cannot place the petitioner in the same position he would have been in had the Board properly provided him an opportunity to challenge its officially noticed findings at the outset.

In addition, allowing an alien to rebut the Board's officially noticed findings only through a motion to reopen would prevent the alien from having such findings tested through the more favorable substantial evidence standard of review that would otherwise be applicable. It is well-established that the grant or denial of asylum by the Board is reviewed through a "substantial evidence" standard. *I.N.S. v. Elias Zacarias*, 112 S. Ct. 812, 815 (1992). However, if evidence is presented for the first time through a motion to reopen, the Board is accorded the more deferential "abuse of discretion" standard of review given the disfavored nature of such motions. *Doherty*, 112 S. Ct. at 725; *Abudu*, 485 U.S. at 105.

In sum, the decision of the Seventh Circuit in this case, and those of the Fifth and District of Columbia Circuits reaching the same conclusion, conflicts with the decisions of the Sixth

Circuit and the Ninth Circuit and are contrary to the basic notions of due process outlined by this Court. It is readily apparent that reopening mechanisms alone cannot provide aliens the meaningful opportunity to rebut the Board's officially noticed findings guaranteed by the Due Process Clause. This Court has made clear that the Board cannot be absolutely required to reopen its proceedings under any circumstances. As such, the pervasive conflict on these issues can only be resolved through guidance from this Court.

II. THE COURT OF APPEALS' REFUSAL TO APPLY 28 U.S.C. § 2347 DISREGARDS THE PLAIN LANGUAGE OF THE STATUTE AND CONFLICTS WITH RULINGS OF OTHER COURTS OF APPEALS WHICH HAVE APPLIED IT ON REVIEW OF BOARD DECISIONS

In the court of appeals, petitioner sought reversal of the Board's decision because the officially noticed findings upon which it was based were not supported by substantial evidence and because the Board's decision violated petitioner's rights under the Due Process Clause. Alternatively, petitioner sought an order requiring the Board, pursuant to 28 U.S.C. § 2347(c)[13], to consider evidence which he offered to rebut the

---

[13] 28 U.S.C. § 2347(c) provides, in pertinent part, as follows:

> "(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that--
>
> (1) the additional evidence is material; and
>
> (2) there were reasonable grounds for failure to adduce the evidence before the agency;
>
> the court may order the additional evidence and any counter-evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and

Board's findings. This remedy is expressly applicable on review of proceedings under the Immigration and Nationality Act. See, *e.g.*, *Osaghae v. I.N.S.*, 942 F.2d 1160, 1161-62 (7th Cir. 1991) ("The statute that empowers the courts of appeal to review decisions by the Board of Immigration Appeals, 8 U.S.C. § 1105a, states that such review is to be governed by 28 U.S.C. § 2347, subsection (c) of which empowers the court of appeals in appropriate cases to direct the agency to consider newly-discovered evidence"); *Martinez de Mendoza v. I.N.S.*, 567 F.2d 1222, 1225 (3d Cir. 1977) (same).

In its decision, the court of appeals reached the stunning conclusion that Section 2347(c) now is unavailable on review of Board decisions and is rendered inapplicable by the reopening mechanisms contained in 8 C.F.R. § 3.2. Although the court seemingly acknowledged the discretion afforded it by Section 2347(c) to order a remand to the Board, the court refused to apply the statute given the existence of the Board's reopening procedures:

> By its own terms. . . section 2347 apparently permits us, as a matter of discretion, to remand to an agency for new evidence when two conditions are met: that the additional evidence is material, and that there were reasonable grounds for failure to adduce the evidence before the agency. . . . *But whatever discretion we may have here we exercise in accordance with* Kaczmarczyk, *which found the reopening procedure to be an appropriate remedy for asylum petitioners seeking to rebut officially noticed facts.*

App. 16a-17a, *infra* (emphasis added). In defiance of Section 2347(c), the court did not consider the newly-adduced evidence offered by petitioner and made no determination as to whether he satisfied its requirements. *Id.* at 19a.

---

may modify or set aside its order . . . ."

The Seventh Circuit's decision, while not unprecedented, disregards the plain statutory language of the Immigration and Nationality Act and Section 2347(c) and irreconcilably conflicts with decisions of other circuits which have applied Section 2347(c) on review of Board proceedings without regard to the reopening mechanisms available at the Board. In effect, the Seventh Circuit has now read Section 2347(c) out of existence as far as review of Board decisions is concerned.

Following the command of 8 U.S.C. § 1105a, most circuits have applied Section 2347(c) in deportation proceedings and have granted such relief where the statutory conditions were met. See, *e.g.*, *Dolores v. I.N.S.*, 772 F.2d 223, 226 (6th Cir. 1985) ("28 U.S.C. § 2347(c) authorizes Courts of Appeals, when reviewing agency final orders, to remand a case to the agency for consideration of additional evidence followed by new findings and another order. . . . We find that section 2347(c) is available on review of INS decisions"); *Coriolan v. I.N.S.*, 559 F.2d 993, 1003 (5th Cir. 1977); *Bernal-Garcia v. I.N.S.*, 852 F.2d 144 (5th Cir. 1988); *Martinez de Mendoza v. I.N.S.*, 567 F.2d 1222 (3d Cir. 1977). In these cases, Section 2347(c) relief was considered without *any* regard to the existence of reopening mechanisms at the Board. Indeed, the Seventh Circuit's holding that Section 2347(c) is rendered inapplicable by 8 C.F.R. § 3.2 was categorically rejected by the Tenth Circuit in *Becerra-Jimenez v. I.N.S.*, 829 F.2d 996 (1987):

> Section 3.2 sets forth procedures for cases where the motion to reopen is initiated with the BIA. Unlike § 2347(c), however, it does not address proceedings to review in a matter pending before a court of appeals. *Thus, § 3.2 cannot be construed to preempt § 2347(c) in a proceeding initiated, as here, in a court of appeals pending review.* Further, it has been held that a reviewing court has the inherent power to remand causes to administrative agencies

> for further proceedings to permit further evidence to be taken or additional findings to be made on essential points.

Id. at 1001-02 (emphasis added), citing *Ford Motor Co. v. Labor Board*, 305 U.S. 364 (1939). *Contra Ramirez-Gonzalez v. I.N.S.*, 695 F.2d 1208, 1213-14 (9th Cir. 1983) ("we will not compel the BIA to reopen [petitioner's] hearing on the basis of the new evidence he wishes to present. He must follow the INS regulations and file a motion to reopen with the BIA"). *Cf. Martinez de Mendoza*, 567 F.2d at 1226 n.9 (3d Cir. 1977) (ordering remand under Section 2347(c) even though no motion to reopen filed, but noting that "in normal circumstances a party asserting new and material evidence should, in the first instance, resort to the remedies available under 8 C.F.R. § 3.2, rather than invoking our power under § 2347(c))".

The cases cited above plainly reveal that the circuits are hopelessly in conflict about the proper role of Section 2347(c) in reviewing Board decisions. As such, guidance from this Court is critically necessary, particularly because the granting of petitioner's motion under Section 2347(c) would effectively cure the due process violations described earlier by placing him in the same position he would have been in if the Board had properly notified him of its intent to rely upon the Chamorro election as the basis for its decision.

III. THE QUESTIONS PRESENTED HAVE GREAT LEGAL AND PRACTICAL SIGNIFICANCE

The importance of the issues raised here extend far beyond the confines of this case and the context in which they arise. Indeed, ascertaining the constitutional limits and uses of official notice would pervasively affect all forms of agency adjudication. Similarly, whether discretionary reopening mechanisms can provide constitutionally adequate procedural safeguards carries broad significance for all cases in which an agency bases a decision upon officially noticed findings.

Finally, the proper role of Section 2347(c) in reviewing agency decisions has never been considered by this Court. The conflict over whether agency reopening mechanisms can preempt or limit the availability of relief in courts of appeals under Section 2347(c) is likewise applicable to review of all agency decisions over which Section 2347 would otherwise control. In short, these conflicts are both widely recognized and of great public significance. See, *e.g.*, *Immigration Board's Administrative Notice of Sandinista Ouster Yields Circuit Split*, 61 U.S.L.W. 1023 (Aug. 18, 1992); 69 INTERPRETER RELEASES 1213 (Sept. 28, 1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

January, 1993

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 91-1949
AGUSTIN RHOA-ZAMORA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review from an Order of
the Board of Immigration Appeals
No. A 27 948 778

No. 91-1515
FELIPE ANTONIO JURESMA-ALTAMIRANO and
LUIS RODRIGUEZ-ALTAMIRANO,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review from an Order of
the Board of Immigration Appeals
Nos. A 26 945 992 and A 26 945 993

No. 91-1551
LUIS ANDRES ESQUIVEL-BERRIOS,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review from an Order of
the Board of Immigration Appeals
No. A 28 578 493

ARGUED FEBRUARY 11, 1992--DECIDED AUGUST 4, 1992

Before CUDAHY and RIPPLE, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

CUDAHY, *Circuit Judge*. The petitioners in these consolidated appeals are Nicaraguan nationals who fled Nicaragua while the Sandinistas were in power and subsequently sought asylum in this country. All four petitioners were denied asylum by an Immigration Judge and appealed to the Board of Immigration Appeals (the Board). In each case, the Board took administrative notice that, as of April 1990, "the Sandinista party no longer controls the Nicaraguan government" and concluded that, "under the present circumstances," the record did not support a finding that the petitioner had "a well-founded fear of persecution by the Sandinista government were he to return to Nicaragua." Petitioners claim that the Board erred in finding that they did not have a well-founded fear of persecution because of the change in the Nicaraguan government. They also contend that the Board violated their

rights to due process by failing to accord each petitioner an individualized determination of his claim. In addition, petitioner Zamora argues that the Board deprived him of due process by failing to give him an opportunity to rebut the noticed facts. Petitioners therefore ask this court either to reverse the Board's decisions or to grant their motions to adduce additional evidence under 28 U.S.C. § 2347(c) and "remand these proceedings to the [Board] for further consideration" in light of that evidence.

I. FACTS

A. *Agustin Rhoa-Zamora*

Agustin Rhoa-Zamora entered the United States illegally on December 24, 1986. He was apprehended by the Immigration and Naturalization Service (INS) and charged with deportability under 8 U.S.C. § 1251(a)(2). Zamora conceded deportability, but requested asylum pursuant to 8 U.S.C. § 1158(a) and withholding of deportation pursuant to 8 U.S.C. § 1253(h). To be eligible for asylum, an alien must establish that he meets the statutory definition of "refugee," which requires him to show either past persecution or a "well-founded fear" of future persecution on account of race, religion, nationality, membership in a particular social group or political opinion. 8 U.S.C. § 1101(a)(42)(A). The decision whether to grant asylum to a statutorily eligible alien is within the discretion of the Attorney General. *INS v. Stevic*, 467 U.S. 407, 423 n.18 (1984). Withholding of deportation, by contrast, is mandatory if the applicant can meet the higher standard of showing a "clear probability" of persecution on account of one of these five grounds if he were returned to his country. *Id.* at 421 n.15.

At his deportation hearing, Zamora testified that he fled Nicaragua because of religious persecution directed at him and

his family. He claimed that he was an adherent of the Charismatic Catholic revival movement and described numerous incidents of Sandinista violence against him and other members of his faith. The Immigration Judge rejected Zamora's testimony as neither "candid" nor "credible" and concluded that Zamora had established neither a "clear probability that he would be subject to persecution upon return to Nicaragua" nor a well-founded, subjective fear of persecution. The judge therefore denied his application for asylum and ordered him to depart the country within two months.

Zamora appealed to the Board. While the appeal was pending, national elections were held in Nicaragua and a new coalition government made up of parties opposed to the Sandinistas was voted into office. On January 31, 1991, the Board issued a written opinion dismissing Zamora's appeal. Without prior notice to Zamora, the Board took administrative notice of the change in government in Nicaragua and concluded that, since the Sandinista party no longer governs Nicaragua, Zamora did not have a well-founded fear of persecution by the Sandinista government should he return. The Board ordered Zamora to depart within thirty days.

On April 25, 1991, Zamora filed with the Board a motion to reopen the proceeding pursuant to 8 C.F.R. § 3.2.[1] In

---

[1] Zamora describes this motion as a "motion to reconsider." 8 C.F.R. § 3.2 provides for both motions to reconsider and motions to reopen. 8 C.F.R. § 3.8 prescribes the form for each type of motion as follows:

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent.

support of his motion, Zamora submitted various materials allegedly evincing the Sandinistas' continuing ability to persecute him. The Board has not, to this date, ruled on the motion. On April 26, 1991, Zamora filed a petition for review of the Board's order in this court. The Board certified the administrative record and relinquished it to this court for purposes of that appeal.

B. *Luis Esquivel-Berrios*

Luis Esquivel-Berrios fled Nicaragua in February of 1985 at the age of thirteen. He went first to Honduras and then to Guatemala, where he remained for three and one-half years before entering the United States in July of 1988. On July 21, 1988, Berrios was arrested by the INS and charged with deportability. Like Zamora, Berrios conceded deportability but sought either asylum or withholding of deportation.

At his hearing, Berrios testified that he had left Nicaragua because he feared being forcibly conscripted into military service by the Sandinista government. He testified that in February of 1985 it was common in his village for twelve- and thirteen-year-old boys to be taken into military service, and that he personally knew of other twelve- and thirteen-year-old boys who had been kidnapped and conscripted. Berrios also testified that he was politically opposed to the Sandinista government, and that he remains a conscientious objector to any form of military service in light of his firmly-held religious and moral

---

We think it clear that Zamora's motion is more accurately characterized as a motion to reopen than as a motion to reconsider, and we will therefore treat it as such throughout this opinion.

In a filing with this court dated October 26, 1992, Zamora's counsel has provided a decision by the Board, dated September 23, 1992, about two pages in length, denying Zamora's motion.

beliefs. He testified that he believed that if he were returned to Nicaragua he would be either shot or jailed by the Sandinista government because of his decision to avoid conscription.

The Immigration Judge found that Berrios' testimony was credible, but nonetheless concluded that Berrios had not met his burden of showing that he was eligible for asylum or withholding of deportation. The judge noted that the Board of Immigration Appeals has long adhered to the position that "it is not persecution for a country to require military service of its citizens." Although there are exceptions to this rule, the judge concluded that his case did not fit within any such exception. He found no objective evidence of record that Nicaragua recruits twelve- or thirteen-year-olds into military service. Further, the judge noted that Berrios could certainly be required to serve in the Nicaraguan military if returned there at present, and could be convicted of a crime and jailed if he refused to do so. Finally, the judge found no objective evidence that Berrios would receive disproportionate treatment for his previous decision to avoid conscription. The Immigration Judge therefore denied Berrios' application for asylum or withholding of deportation and ordered that he be deported. The Board affirmed this decision based on the April 1990 change of government in Nicaragua, again without prior notice to the petitioner. Berrios did not file a motion to reopen or reconsider but appealed directly to this court.

C. *Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano*

Half-brothers Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano (the Altamiranos or the Altamirano brothers) entered the United States illegally on October 26, 1983. They were arrested by INS officials four days later and charged with deportability. Like the other petitioners in this

case, the Altamiranos conceded deportability but sought asylum and withholding of deportation.

The Altamiranos testified before the Immigration Judge that they fled Nicaragua in order to avoid recruitment into the Sandinista army. They testified that they are Pentecostal Christians, as are the other members of their family, and that the Pentecostal religion forbids its members to participate in any service requiring the carrying of arms.[2] The brothers also described various threats of persecution made against them for adhering to their religious convictions, including statements by military authorities that they would be imprisoned for at least five years if they refused to serve in the military.

The Immigration Judge accepted the brothers' testimony, but found that they had not established a well-founded fear of persecution based on their religious beliefs because they offered no evidence that they had ever requested exemption from military service based on those beliefs.[3] The judge also noted that the brothers did not claim religious persecution, in general,

---

[2] Although it is not relevant to our decision here, we note that the Supreme Court has recently cast considerable doubt on whether these allegations, even if true, can support a well-founded fear of persecution on account of religion. In *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992), the Court held that a guerrilla organization's attempt to conscript the asylum applicant into its military forces does not necessarily constitute persecution on account of political opinion. Based on that decision, the Court vacated and remanded the Ninth Circuit's decision in *Canas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1990), which held, *inter alia*, that petitioners who would be imprisoned in their native country for refusing to serve in the military based on their religious beliefs had established a "clear probability of persecution on account of religious beliefs." 902 F.2d at 717, vacated and remanded, *INS v. Canas-Segovia*, 112 S. Ct. 1152 (1992).

[3] In fact, Luis testified that he had served in the Nicaraguan army in 1980 and 1981, although he had been a Pentecostal Christian all of his life.

by the Sandinistas. The judge concluded that the brothers had failed to establish that they would be singled out or systematically persecuted because of their religious beliefs. He therefore denied their applications for asylum or withholding of deportation and granted voluntary departure. The Board affirmed this decision based on the intervening change of government in Nicaragua, without prior notice to the Altamiranos, and ordered the brothers to depart within thirty days. The Altamiranos did not file a motion to reopen or reconsider but appealed directly to this court.

II. ANALYSIS

A. *Agustin Rhoa-Zamora*

1. *Jurisdiction*

The INS argues that this court has no jurisdiction over Zamora's petition because his motion to reopen is still pending before the Board, so that he has failed to exhaust his administrative remedies as required by 8 U.S.C. § 1105a(c). In support of this position, the INS cites the Sixth Circuit's decision in *Dokic v. INS*, 899 F.2d 530 (6th Cir. 1990). In *Dokic*, the court held that an applicant for asylum cannot obtain judicial review of an order of deportation until he has exhausted his administrative remedies "by filing a motion to reopen." *Id.* at 532. Presumably, this rule would also require the petitioner to wait until the motion was denied before seeking appellate review of the Board's order.

We disagree with the Sixth Circuit's interpretation of the exhaustion requirement. Section 1105a(c) provides:

> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him

> *as of right* under the immigration laws and regulations. . . .

(emphasis added). As Zamora points out, reopening is a discretionary remedy, not one available as of right. *INS v. John Ha Wang*, 450 U.S. 139, 143 (1981); Note, *Timeliness of Petitions for Judicial Review Under Section 106(a) of the Immigration and Nationality Act*, 86 Mich. L. Rev. 990, 1011 (1988). Further, it would be a waste of time and administrative resources to require petitioners to file a motion to reopen in those cases, such as *Dokic* itself, in which they do not claim to have any new evidence, but wish to challenge the Board's decision on the existing administrative record. Such a rule is therefore contrary to the strong policy interest in preventing the use of frivolous motions to reconsider or reopen in order to postpone the execution of deportation orders. *Pierre v. INS*, 932 F.2d 418, 421 (5th Cir. 1991); Note, *supra*, at 1012-13. This court has routinely reviewed Board decisions ordering deportation in cases where the petitioner did not file a motion to reopen. *See, e.g., Zulbeari v. INS*, 963 F.2d 999 (7th Cir. 1992); *Osaghae v. INS*, 942 F.2d 1160 (7th Cir. 1991); *Kaczmarczyk v. INS*, 933 F.2d 588 (7th Cir.), *cert. denied*, 112 S. Ct. 583 (1991). We see no reason to change that approach.

We are more concerned, however, with another jurisdictional issue that Zamora's pending motion to reopen creates. The Ninth and Eleventh Circuits hold that a motion to reopen deportation proceedings following the Board's affirmance of an immigration judge's deportation order renders the Board's decision nonfinal, and therefore nonappealable. *Fleary v. INS*, 950 F.2d 711 (11th Cir. 1992); *Chu v. INS*, 875 F.2d 777 (9th Cir. 1989); *Hyun Joon Chung v. INS*, 720 F.2d 1471, 1474 (9th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984). The Third Circuit, on the other hand, holds that a pending motion to reopen "does not render the order of

deportation nonfinal." *Alleyne v. INS*, 879 F.2d 1177, 1181 (3d Cir. 1989).

In administrative law generally, there appears to be a strong presumption that, with respect to judicial review, the filing of a motion to reopen or reconsider renders an agency's decision nonfinal for purpose of determining when the time to appeal begins to run. *Interstate Commerce Comm'n v. Locomotive Engineers*, 482 U.S. 270, 284-85 (1987); *Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs*, 798 F.2d 215, 218 (7th Cir. 1986). The majority of courts follow this approach despite the Administrative Procedure Act's provision that agency action that is "otherwise final" is final for purposes of review "whether or not" a motion for reopening or reconsideration has been filed. 5 U.S.C. § 704. As the Supreme Court has noted, this provision "has long been construed . . . merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review . . . but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal." *Locomotive Engineers*, 482 U.S. at 284-85 (emphasis in original).[4] In *Locomotive Engineers*, the Court placed its imprimatur on this interpretation. *Id.*

In the wake of *Locomotive Engineers*, several circuits have taken the next logical step of holding that if the filing of a motion to reopen renders an agency decision nonfinal for purposes of determining the time for appeal, it must also render that decision nonfinal for purposes of appellate jurisdiction. *See United Transp. Union v. Interstate Commerce Comm'n*, 871

---

[4] The legislative history of section 704 supports this interpretation. *See West Penn Power Co. v. Environmental Protection Agency*, 860 F.2d 581, 585 (3d Cir. 1988).

F.2d 1114 (D.C. Cir. 1989); *West Penn Power Co. v. Environmental Protection Agency*, 860 F.2d 581 (3d Cir. 1988); *Winter v. Interstate Commerce Comm'n*, 851 F.2d 1056, 1062 (8th Cir.); *cert. denied*, 488 U.S. 925 (1988).[5] In *Chu v. INS*, the Ninth Circuit applied this rule in the context of deportation proceedings, concluding that there was "no principled basis upon which to distinguish Chu's case from *Locomotive Engineers* and its progeny." 875 F.2d at 781.

We disagree with the Ninth Circuit's conclusion. In *West Penn Power*, the Third Circuit began its analysis of the effect of a motion to reopen on an order of the EPA by observing that "[i]t makes sense to define 'finality' under the Clean Air Act in the same way that it is defined in administrative law generally." 860 F.2d at 854. It does not necessarily make sense, however, to define "finality" under the INA in the same way it is defined in administrative law generally. In fact, there are good reasons not to apply the *Locomotive Engineers* rule to deportation proceedings. That rule "basically rest[s] on a notion of judicial economy." *Arch Mineral Corp.*, 798 F.2 at 219. "It is obviously wasteful of the resources of the courts to burden them with objections to administrative action which may be obviated by agency action on reconsideration." *Id.; see also West Penn Power*, 860 F.2d at 585 ("allowing a petitioner to apply to both

---

[5] In *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371 (7th Cir. 1986), this court held that the pendency of a motion to reopen or reconsider has no effect on an appellate court's jurisdiction. *Id.* at 378. That holding relied explicitly on the opinion of then-Judge Scalia in *American Trucking Ass'n. Inc. v. interstate Commerce Comm'n*, 697 F.2d 1146, 1148 n.* (D.C. Cir. 1983). The Supreme Court's decision in *Locomotive Engineers*, however, casts serious doubt on the continuing viability of *American Trucking* and its progeny. *West Penn Power*, 860 F.2d at 587. But we need not resolve this issue here, given our conclusion that the rule of *Locomotive Engineers* does not apply in the immigration context, whatever its effect on administrative law generally.

the court and the agency at the same time[] . . . could only lead to waste of resources on the part of the agency, the court, or both, without any countervailing benefit").

In the immigration context, however, efficient use of judicial resources is secondary to a different goal: preventing the use of "dilatory tactic[s] to postpone the execution of deportation orders." *Alleyne*, 879 F.2d at 1180; *see also Berroteran-Melendez v. INS*, 955 F.2d 1251, 1255 (9th Cir. 1992) (electing to exercise jurisdiction over appeal where petitioner filed motion to reopen *after* seeking appellate review, on ground that "the potential for abuse of the process to circumvent the BIA's discretionary power to grant or deny a stay of deportation pending a motion to reopen outweighs concerns with efficiency"). Application of the *Locomotive Engineers* rule on finality would "directly contravene" that goal. *Alleyne*, 879 F.2d at 1180. Under the INA, deportation is available only "[w]hen a *final order* of deportation under administrative processes is made against any alien." 8 U.S.C. § 1252(c) (emphasis added). Thus, if the filing of a motion to reopen or reconsider destroyed the finality of the Board's order, that motion might delay deportation so long as it was pending.[6] Moreover, under the Ninth Circuit's scheme an alien who filed such a motion within the statutory period for appeal could further delay deportation if the motion was denied by petitioning for judicial review both of the Board's initial order and of the denial of the motion, thereby obtaining an automatic stay of deportation. 8 U.S.C. § 1105a(a)(3). Such a result is

---

[6] Such a result would also seem to conflict with INS regulations, which provide that "[t]he filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decisions made in the case." 8 C.F.R. § 3.8(a) (1988).

clearly contrary to Congress' intent in enacting the INA.[7] Finally, we note that the INS regulations providing for motions to reopen or reconsider do not seem to contemplate such a result. Rather, the regulations appear to assume that such motions may be pending at the same time the Board's order is being appealed:

> Motions to reopen or reconsider shall state whether the validity of the order has been *or is* the subject of any judicial proceeding.

8 C.F.R. § 103.5a (emphasis added). We conclude that the pendency of a motion to reopen or reconsider an order of deportation does not render the order nonfinal for purposes of this court's jurisdiction. We have jurisdiction over Zamora's case.

2. *Due Process*

Zamora contends that the Board deprived him of due process by failing to accord him a sufficiently individualized

---

[7] In 1990, Congress amended section 1105a by adding a provision that recognizes the availability of motions to reopen or reconsider:

> [W]henever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with review of the order.

8 U.S.C. § 1105a(a)(6) (1990 Supp.). The Eleventh Circuit has interpreted this provision as "follow[ing] the contours of the Ninth Circuit decisions" regarding the effect of a motion to reopen or reconsider on the finality of a Board order. *Fleary*, 950 F.2d at 713. This court, however, has concluded that the Eleventh Circuit's rule is "incompatible with the plain language of" the provision. *Akrap v. INS*, No. 91-2825, slip op. at 9 (7th Cir. June 26, 1992). Thus, the 1990 amendment to the INA actually supports our decision here.

determination of his claims. Zamora is certainly correct that the Board is required to "engage in a careful, individualized review of the evidence presented in [his] application[] and hearing[]." *Kaczmarczyk*, 933 F.2d at 595. Further, we agree with Zamora that the Board's disposition of these cases in three opinions employing identical, "boilerplate" paragraphs regarding the effect of the Nicaraguan election casts a cloud over the Board's decisions and hinders meaningful judicial review. We are also aware, however, tat "agency action is entitled to a presumption of regularity," so that "the burden is on the petitioner[] to convince us that the [Board] gave short shrift to the evidence [he] presented." *Id.* The Board's written decision, which describes in some detail Zamora's testimony regarding his alleged reasons for fearing persecution, demonstrates that the Board did consider Zamora's particular evidence, at least to a degree. Although the Board apparently based its decision solely on the change of government in Nicaragua, without any examination of how that change related to Zamora's particular claims, the Board's consideration of his case was not so deficient as to constitute a denial of due process.

Zamora also argues that he was deprived of due process because he was not given an opportunity to rebut the Board's conclusion as to the significance of the Nicaraguan elections. This argument is entirely without merit. In *Kaczmarczyk*, this court made clear that due process does not require the Board to give an asylum applicant the opportunity to rebut noticed facts prior to reaching a decision. Rather, we found that the mechanism of the motion to reopen, which "allows asylum petitioners an opportunity introduce evidence rebutting officially noticed facts," provides a sufficient opportunity to be heard to satisfy the requirements of due process. *Id.* at 597. *Accord Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992); *Rivera-Cruz v. INS*, 948 F.2d 962, 968-69 (5th Cir. 1991),

rehearing denied, 954 F.2d 723 (1992). *But see Castillo-Villagra v. INS*, 1992 WL 172995 (9th Cir. July 27, 1992); *Ulloa v. INS*, 944 F.2d 905 (6th Cir. 1991) (unpublished disposition). *Cf. Wojcik v. INS*, 951 F.2d 172, 173 (8th Cir. 1991). As discussed above, Zamora has in fact filed such a motion. The Board did not deprive Zamora of his right to due process.[8]

3. *Substantial Evidence*

Zamora also contends that the Board's decision denying him asylum was not supported by substantial evidence because, contrary to the Board's assumption, the change in government in Nicaragua did not significantly diminish the ability of the Sandinistas to persecute him. He argues that the regime headed by President Violeta Chamorro is unstable and that the Sandinistas still wield significant power. This argument rests *entirely* on evidence that Zamora submitted in support of his motion to reopen and his motion to this court for leave to adduce additional evidence. None of this evidence was before the Board at the time it made its determination in Zamora's case. We will not weigh evidence that the Board has not previously considered; an appellate court is not the appropriate forum to engage in fact-finding in the first instance. *See*

---

[8] We do note that in order for the motion to reopen procedure to satisfy the requirements of due process it must provide a "'*meaningful* opportunity to be heard.'" *Kaczmarczyk*, 933 F.2d at 595 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (emphasis added). Thus, as the D.C. Circuit recently recognized, it would raise a serious due process problem if the Board did not actually consider these motions but simply filed them away in some obscure nook or cranny until the petitioner in question could be deported. *See Gutierrez-Rogue*, 954 F.2d at 773. So far as we can tell from this record, however, this is not such a case; the Board's delay in deciding Zamora's motion does not seem attributable to any improper action by the Board. *See infra* p. 15.

Osaghae, 942 F.2d at 1162 ("we are not to take evidence and base our decision on some mixture of that evidence with the evidence that was before the Board"); *Rivera-Cruz v. INS*, 948 F.2d at 967 ("we cannot weigh evidence that has not been brought previously before the Board"); *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980), *cert. denied*, 456 U.S. 994 (1982) ("this Court does not sit as an administrative agency for the purpose of fact-finding in the first instance"). The evidence that *was* before the Board--that the Sandinistas had ceased to control the Nicaraguan government--tends to support its decision.

Nor will we order the Board to consider Zamora's new evidence, as he alternatively requests. In *Osaghae*, we held that "if the administrative record is inadequate because the Board has failed without justification to consider newly discovered evidence, we can remand for the creation of an adequate record" pursuant to 28 U.S.C. § 2347(c). 942 F.2d at 1162. Here, the fact that the Board has not yet decided Zamora's motion to reopen does not necessarily mean that the Board has "failed without justification" to consider Zamora's evidence with respect to the weakness of the Chamorro regime. A delay of more than a year in deciding a motion to reopen, while certainly significant, does not compel the conclusion that the Board has acted improperly. We can accept the INS's claim that the delay is a normal consequence of the INS's "staggering" caseload. Br. at 24. Further, we note that Zamora's petition to reopen was filed only one day before he petitioned for review in this court. Thus, the Board's delay may also be attributable to a decision not to waste limited resources resolving a motion that might well be rendered moot by this court.

The *Osaghae* ruling itself is limited to situations in which the Board "has acted improperly" in preventing an asylum petitioner from placing evidence before it. 942 F.2d at 1162.

By its own terms, however, section 2347 apparently permits us, as a matter of discretion, to remand to an agency for new evidence when two conditions are met: that the additional evidence is material, and that there were reasonable grounds for failure to adduce the evidence before the agency.[9] But whatever discretion we may have here we exercise in accordance with *Kaczmarczyk*, which found the reopening procedure to be an appropriate remedy for asylum petitioners seeking to rebut officially noticed facts.[10] Now that the present appeal has been resolved, we assume that the Board will fully address Zamora's motion in a timely fashion.[11]

---

[9] 28 U.S.C. § 2347(c). Other circuits have held without reference to improper action that remand may in certain circumstances be appropriate. *See, e.g., Bernal-Garcia v. INS*, 852 F.2d 144 (5th Cir. 1988); *Becerra-Jimenez v. INS*, 829 F.2d 996 (10th Cir. 1987); *Martinez de Mendoza v. INS*, 567 F.2d 1222 (3d Cir. 1977).

[10] 933 F.2d at 597. *See also Ramirez-Gonzalez v. INS*, 695 F.2d 1208, 1213-14 (9th Cir. 1983) (refusing to remand under § 2347 and noting that the petitioner could have filed a motion to reopen); *Martinez de Mendoza v. INS*, 567 F.2d 1222, 1226 n.9 (3d Cir. 1977) ("[I]n normal circumstances a party asserting new and material evidence should, in the first instance, resort to [the reopening procedure] rather than invoking our power under § 2347(c).").

[11] We noted above that the filing of a motion to reopen does not automatically stay execution of a Board ruling. *See supra* n.6. As we observed in *Kaczmarczyk*, "[t]here thus exists the possibility that unsuccessful asylum applicants may be ordered to leave the country before the Board has ruled on their motions to reopen." 933 F.2d at 597. We therefore reiterate here our presumption that "when an asylum applicant uses a good faith motion to reopen to dispute officially noticed facts, the Board will exercise its discretion to stay the execution of its decision until it has had an opportunity to rule on the applicant's motion." *Id.; see also Gutierrez-Rogue*, 954 F.2d at 773 (adopting the same presumption).

B. *Luis Andres Esquivel-Berrios*

Like Zamora, petitioner Berrios argues that he was deprived of his right to due process because the Board failed to engage in sufficiently individualized consideration of his evidence. He also contends that the Board's finding that he does not have a well-founded fear of future persecution is not supported by substantial evidence for the same reason that Zamora alleges. Finally, Berrios argues that, even if the Board could reasonably conclude that he did not have a well-founded fear of future persecution, he was nonetheless entitled to asylum based on the severity of his *past* persecution.

1. *Due Process*

Again, we note the cloud cast over the Board's decision by its use of boilerplate paragraphs in describing the salient factors involved in its determination. In addition, the Board's written decision affirming the Immigration Judge's denial of Berrios' petition does not contain the sort of detailed description of Berrios' testimony that we saw in Zamora's case. Thus, it is less immediately apparent that the Board considered Berrios' evidence at all. Nevertheless, we find that the Board's decision contains sufficient indicia of individualized determination to satisfy due process. In particular, the Board notes Berrios' "testimony concerning the military round-up of young males, like himself, in Nicaragua." This statement indicates that the Board was aware of Berrios' specific claim. The Board also makes an explicit finding that the State Department's *Country Reports on Human Rights Practices* for the years 1984-1985 and 1987-1988, which Berrios claimed the Immigration Judge improperly prevented him from submitting, "do not establish his present eligibility for either withholding of deportation or asylum." Again, this finding suggests that the Board was at least aware of the particulars of Berrios' case. Although, as in Zamora's case, the Board did not discuss the relationship

between the change in the Nicaraguan government and Berrios' particular claims, the Board's consideration of Berrios' case was not so inadequate as to amount to a denial of due process.

2. *Substantial Evidence*

Like Zamora, Berrios also challenges the Board's finding that he did not have a well-founded fear of persecution based entirely on evidence as to the stability of the Chamorro regime that was not before the Board. As already noted, we will not consider such evidence for the first time on appeal. The Board's decision is supported by the evidence that was before it at the time it decided Berrios' case.[12] And Berrios' request that we remand to the Board with orders to consider his new evidence has even less basis than did Zamora's, since Berrios has never given the Board *any* opportunity to consider this evidence. Because the Board did not provide Berrios with an opportunity to rebut the noticed facts prior to deciding his case, Berrios has a due process right to have this evidence considered. *Kaczmarczyk*, 933 F.2d at 597. In order to do so, however, he must file a motion to reopen with the Board. *Id.*

We reject Berrios' argument that he is entitled to asylum based solely on the severity of his past persecution. In *Matter of Chen*, Interim Decision 3104 (BIA 1989), the Board held that where an asylum applicant has been subjected to especially severe persecution in the past, "humanitarian reasons" may

---

[12] The Board noted in its decision that "the new president of Nicaragua has announced a general amnesty covering the hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription." This evidence, together with the broad observation that the Sandinistas no longer controlled the Nicaraguan government, certainly tends to support a conclusion that Berrios no longer had a well-founded fear of persecution based on his avoidance of conscription into the Sandinista military should he be returned to Nicaragua.

warrant the granting of asylum "even if there is little likelihood of future persecution." Berrios contends that his is such an extraordinary case because he fled Nicaragua in order to avoid forcible conscription into the Sandinista military at the age of twelve, a practice that violates "settled principles of United States and international law." Br. at 23. But the Board, which clearly was aware of the nature of Berrios' claim, found that Berrios had not established the sort of extreme persecution necessary to meet the *Chen* standard. Given that Berrios was never in fact forcibly conscripted, or even personally threatened with forced conscription, we do not think that the Board's conclusion was unsupported.

C. *Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano*

The Altamirano brothers, like both Zamora and Berrios, argue that the Board failed to accord them a sufficiently individualized determination of their claims. Their argument, however, has more merit than does that of Zamora or Berrios. The Board's written opinion dismissing the Altamiranos' appeal is made up *entirely* of boilerplate; there is nothing in the opinion to suggest that the Board was even aware of the particular claims made by the Altamirano brothers. Every paragraph in the decision is identical to a paragraph in the Board's decisions regarding Zamora and Berrios. There is nothing individualized about the Board's analysis in this case. We agree with the Altamiranos that the Board's consideration of their case was so deficient as to deny them due process and therefore vacate the Board's decision and remand the case for additional proceedings consistent with this opinion. We assume that such proceedings will include an opportunity of the brothers to attempt to rebut the Board's conclusion as to the significance of the Nicaraguan elections.

The brothers also contend that the Board's conclusion that they did not have a well-founded fear of persecution given the change of government in Nicaragua is not supported by substantial evidence. They may well have a point--we are somewhat doubtful that a Board decision which demonstrates no awareness of the particular petitioner's claims could be supported by substantial evidence. Because we vacate the Board's decision on other grounds, however, we need not resolve this issue.

III. CONCLUSION

For the foregoing reasons, the petitions of Agustin Rhoa-Zamora and Luis Andres Esquivel-Berrios are denied; the petition of Felipe Antonio Juresma-Altamirano and Luis Rodriguez-Altamirano is granted, and the Board's decision is vacated and remanded for further proceedings consistent with this opinion. In addition, the petitioners' motions to adduce additional evidence pursuant to 28 U.S.C. § 2347(c) are denied. If the petitioners wish to present their new evidence to the Board, they should do so by way of a motion to reopen. Because such a motion implements a due process right, *Kaczmarczyk*, 933 F.2d at 597, it must be considered in good faith by the Board. *Supra* at 14 n.8. We admonish the Board to consider petitioners' motions in that light.

A true copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

File: A28 578 493 - Harlingen Date: January 17, 1991

In re: LUIS ANDRES ESQUIBEL-BERRIOS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Craig B. Mousin, Esquire
Midwest Immigrant Rights Center
327 South LaSalle Street, Suite 1400
Chicago, Illinois 60604

ON BEHALF OF SERVICE:

John D. Carte
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - Entered without inspection

APPLICATION: Asylum; withholding of deportation; voluntary departure

ORDER:

PER CURIAM. By oral decision dated September 29, 1988, an immigration judge found the respondent, a native and citizen of Nicaragua, deportable as charged, denied his applications for asylum, withholding of deportation, and voluntary departure. *See* sections 208(a) and 243(h) of the

Immigration and Nationality Act, respectively, 8 U.S.C. §§ 1158(a) and 1253(h); *see also* section 244(e) of the vAct, 8 U.S.C. § 1254(e). The respondent's asylum and withholding claims are based on a fear of conscription by the Sandinistas, who controlled the government at the time he departed Nicaragua. The appeal will be dismissed.

After careful review of the record, we find no basis to support the respondent's contention that he has a well-founded fear of persecution on account of one of the five grounds enumerated in section 208(a) of the Act or that he has established a claim of past persecution sufficient to merit a grant of asylum relief. *See* section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.5; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987); *M.A.* v. *INS*, 899 F.2d 304 (4th Cir. 1990) (*en banc*), *aff'g Matter of A-G-*, Interim Decision 3040 (BIA 1987); *Matter of Mogharrabi*, Interim Decision 3028 (BIA 1987); *Matter of Chen*, Interim Decision 3104 (BIA 1989).

In this regard, we take administrative notice that the Sandinista party no longer controls the Nicaraguan government.[1] Effective April 25, 1990, a new coalition

---

[1] It is well established that administrative agencies and the courts may take judicial (or "administrative") notice of commonly known facts. *See Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937). Therefore, this Board may properly take administrative notice of changes in foreign governments. *See Kubon* v. *INS*, 913 F.2d 386 (7th Cir. 1990). *See, e.g., Matter of Chen*, Interim Decision 3104 (BIA 1989); *Matter of Stojkovic*, 10 I&N Dec. 281 (BIA 1963). *See also Third Nat. Bank in Nashville* v. *Impac Limited, Inc.*, 432 U.S. 312, 317 (1977); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Schulte* v. *Gangi*, 328 U.S. 108, 120 (1946); *United States* v. *Berrojo*, 628 F.2d 368 (5th Cir. 1980); *First Nat. Bank of Chicago* v. *Material Serv. Corp.*, 544 F.2d 911, 916 (7th Cir. 1976); *Spillway Marina, Inc.* v. *United States*, 445 F.2d 876, 878 (10th Cir. 1971). *See generally* 4 Stein, Administrative Law, § 2501 (1986).

government, formed by parties in opposition to the Sandinistas ("UNO"), has succeeded the former government of the Sandinista party following national elections and the inauguration of Violeta Chamorro as the new president. Further, the new president of Nicaragua has announced a general amnesty covering the hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription.[2] Given that the Sandinista party no longer governs Nicaragua, under the present circumstances we do not find that the record now before us supports a finding that the respondent has a well-founded fear of persecution by the Sandinista government were he to return to Nicaragua.

Further, even if one were to assume that the respondent's previous experiences in Nicaragua amounted to past persecution, or that at the time he left and for some time thereafter he had a well-founded fear of persecution should he return, it is not established that he presently merits a grant of asylum. In *Matter of Chen, supra*, we stated that in certain circumstances past persecution alone might warrant a grant of asylum even if there was no reasonable likelihood of present persecution. For instances, asylum could be granted if the past persecution had been so severe that return to the country of persecution would be inhumane. Even if past persecution had been established in the instant case, we would not conclude from our independent review of the record that there are humanitarian or compelling bases that presently warrant a grant of asylum.

Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he also has

---

[2] *See, e.g.*, Violeta Chamorro's inaugural address, as reported in *Chamorro Takes Nicaraguan Helm; Hails New Era*, New York Times, April 26, 1990, at A1.

failed to satisfy the clear probability standard of eligibility required for withholding of deportation. *See INS* v. *Stevic*, 467 U.S. 407 (1984). The evidence does not establish that if he were now to return to Nicaragua that it is more likely than not that he would be subject to persecution on account of one of the five grounds specified in section 243(h) of the Act.

On a related point, the respondent contends the immigration judge erred in denying his motion for a continuance of the September 28, 1988, hearing, sought for the two-fold purpose of affording the respondent's former counsel the opportunity to review the State Department's *Country Reports on Human Rights Practices* ("Country Reports") and to introduce any appropriate evidence found therein into the record. On appeal, the respondent, through newly-retained counsel, argues the Country Reports corroborate his testimony concerning the military round-up of young males, like himself, in Nicaragua and establish his eligibility for withholding of deportation. Hence, he claims, the immigration judge's decision to deny his continuance motion prejudiced his case. We do not agree inasmuch as "good cause" to postpone the hearing for additional attorney preparation has not been shown. *See* 8 C.F.R. §§ 3.27, 242.13 (1990); *see also Matter of Perez*, Interim Decision 3025 (BIA 1987); *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983). No explanation has been provided as to the reasons for counsel's failure to review the Country Reports prior to the September 28, 1988, hearing. We note former counsel entered his appearance in the matter as early as 6 weeks prior to the September hearing. Furthermore, the respondent has failed to show he was prejudiced by the immigrant judge's handling of the case. *See Matter of Perez, supra; Matter of Santos*, Interim Decision 2969 (BIA 1984). For the reasons set forth above, the Country Reports for years 1984-1985 and 1987-1988, which the respondent claims he was prevented from submitting below and

which he now submits on appeal, do not establish his present eligibility for either withholding of deportation or asylum. *See M.A.* v. *INS, supra; Matter of Chen, supra.*

Finally, as with all forms of discretionary relief, it is the alien who bears the burden of proving he is eligible for the privilege of voluntary departure. On appeal, the respondent argues he does not have a criminal record and is a person of good moral character. Hence, he submits, he is eligible for voluntary departure. While the respondent's good moral character and lack of criminal record are factors germane to the determination of whether he is eligible for voluntary departure, he has failed to substantiate these claims on the record before us. Section 244(e) of the Act; 8 C.F.R. § 244.1 (1990). Although the respondent claims to have stated in his asylum application that he has never been convicted or sentenced for a crime, we are unable to find such a statement in the record. *See generally Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Moreover, in order to establish his eligibility for the relief he now seeks, the respondent must also show that he is willing and able to depart the United States voluntarily in lieu of deportation at his own expense. 8 C.F.R. § 244.1 (1990). No such showing, however, has been made. Therefore, the respondent has failed to sustain his burden, which is his alone, of proving his statutory eligibility for the privilege of voluntary departure.

Accordingly, the appeal is dismissed.

FOR THE BOARD

DANIEL FELIX ULLOA, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent

No. 91-3028

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1991 U.S. App. LEXIS 22288
944 F.2d 905 (Table)

September 17, 1991, Filed

On appeal from the Board of Immigration Appeals; A28 704 546.

JUDGES: Nelson and Suhrheinrich, Circuit Judges; and James Harvey*, Senior District Judge.

OPINION BY: PER CURIAM

OPINION: Petitioner Daniel Ulloa, a citizen of Nicaragua, petitions for review of a decision of the Board of Immigration Appeals ("Board") denying his request for asylum and withholding of deportation. For the reasons stated below, we remand for additional proceedings consistent with this opinion.

---

* The Honorable James Harvey, United States Senior District Judge for the Eastern District of Michigan, sitting by designation.

I.

Ulloa entered the United States on March 10, 1985, at Miami, Florida, as a non-immigrant visitor. He remained in the United States after the expiration date of his visitor's visa. The Immigration and Naturalization Service ("INS") ordered petitioner to show cause why he should not be deported pursuant to section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2). Petitioner conceded deportability and applied for asylum or withholding of deportation based upon his past experiences with and fear of future persecution from the Sandinista government of Nicaragua.

On December 11, 1989 the Immigration Judge ("IJ") found petitioner to be deportable as charged, but granted his application for asylum and withholding of deportation. The INS appealed to the Board. On December 11, 1990 the Board affirmed the IJ's determination of deportability, but reversed the grant of asylum and withholding of deportation. The Board first noted that the IJ had not found that petitioner was the subject of "past persecution" in Nicaragua. The Board also independently concluded that petitioner had failed to show he was the victim of "past persecution." The Board then took administrative notice of the fact that the Sandinista government no longer controlled Nicaragua because of the April 25, 1990 election of Violeta Chamorro's new coalition government. The Board determined that petitioner could not suffer persecution under the new Chamorro government because the new government granted a general amnesty to the Contras and ended military conscription. The Board therefore concluded that this change in government eliminated petitioner's "fear of future persecution" in Nicaragua, and reversed the IJ's decision. The Board granted petitioner 30 days to voluntarily depart the United States. This appeal followed.

II.

Petitioner contends that the Board improperly took administrative notice of the change in Nicaragua's government without affording him notice and an opportunity to introduce evidence that the Sandinistas still control much of the government, including the military.

We agree with the recent decision in *Kaczmarczyk v. INS*, 933 F.2d 588, 593-95 (7th Cir. 1991) that the Board may properly take administrative notice of, and base its decision on, a change in the political climate of an alien's native country. However, unlike *Kaczmarczyk*, where the Board's administratively noticed facts simply supplemented the IJ's factual findings and conclusions, the Board here reversed the IJ's decision based on the administratively noticed facts. This reversal of the IJ's grant of asylum and withholding of deportation occurred without either prior notice or affording petitioner an opportunity to present rebuttal evidence.

It is well established that aliens are entitled to notice and an opportunity to be heard in deportation proceedings. *See Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950). When an administrative agency takes official notice of facts that "could be reasonably challenged and they importantly affect the decision, giving the parties a pre-decision chance to respond to them may be an essential part of fair procedure." *Banks v. Schweiker*, 654 F.2d 637, 642 n.11 (9th Cir. 1981) (quoting 3 K. Davis, *Administrative Law Treatise*, § 15:6 at 195-96 (2d ed. 1980)). "Such fairness concerns appear to have motivated the drafters of Federal Rule of Evidence 201(e), which provides litigants in federal court just such an opportunity rebut judicially noticed facts." *Kaczmarczyk*, 933 F.2d at 596. We believe similar notions of fairness require that the Board give aliens adequate notice and a meaningful opportunity to respond to

officially noticed facts that bear upon the Board's decision-making process. While our scope of review over deportation proceedings is narrow, "it extends at least to a determination as to whether the procedure followed by the Board in a particular case constitutes an improper exercise of discretion." *Ravancho v. INS*, 658 F.2d 169, 176 (3d Cir. 1981) (remanding case to the Board due to Board's failure to consider all relevant evidence offered by petitioner).

We conclude that the procedure followed by the Board in the present case was an improper exercise of discretion because it denied the petitioner any meaningful opportunity to present rebuttal evidence.[1] Consequently, we REMAND this case so that petitioner may offer rebuttal evidence regarding the change of governments in Nicaragua and STAY the order of deportation until such evidence has been considered by the Board.

---

[1] The INS contends that petitioner may present rebuttal evidence in a motion to reopen his case pursuant to 8 C.F.R. § 3.2. In our view, requiring a petitioner facing deportation to file a motion to reopen the proceedings in order to rebut officially noticed facts creates an unnecessary procedural hurdle for such a petitioner. The filing of a motion to reopen does not serve to stay the execution of an order of deportation, see 8 C.F.R. § 3.8(a), and thus such a procedure imposes the unreasonable risk that a petitioner may be deported before the Board considers the rebuttal evidence contained in his motion to reopen. *Cf. Kaczmarczyk*, 933 F.2d at 597 n.9.

Title 28, United States Code, Section 2347

Insofar as relevant, 28 U.S.C. § 2347 provides:

"(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that--

> (1) the additional evidence is material; and
>
> (2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counter evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order."

Supreme Court, U.S.
FILED
APR 05 1993
OFFICE OF THE CLERK

(7)

No. 92-1271

In the Supreme Court of the United States

OCTOBER TERM 1992

LUIS ANDRES ESQUIVEL-BERRIOS, PETITONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
ROBERT KENDALL, JR.
DONALD E. KEENER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

26 pp

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals deprives a litigant of due process if it takes official notice of facts relevant to a matter before it without first giving the litigant prior notice, even if it grants the litigant an opportunity to rebut the noticed facts by means of a motion to reopen.

2. Whether 28 U.S.C. 2347(c) required the court of appeals to remand the case to the Board of Immigration Appeals for taking new evidence even though the alien had not yet attempted to present the proffered evidence to the Board by means of a motion to reopen.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Becerra-Jiminez v. *INS*, 829 F.2d 996 (10th Cir. 1987)	10
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984)	8
Coriolan v. *INS*, 559 F.2d 993 (5th Cir. 1977)	11
Demarest v. *Manspeaker*, 498 U.S. 184 (1991)	8
Fleurinor v. *INS*, 585 F.2d 129 (5th Cir. 1978)	11
Martinez de Mendoza v. *INS*, 567 F.2d 1222 (3d Cir. 1977)	11
Osaghae v. *INS*, 942 F.2d 1160 (7th Cir. 1991)	9, 10, 11
Paul v. *INS*, 521 F.2d 194 (5th Cir. 1975)	11

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause)	7
28 U.S.C. 2347	7
28 U.S.C. 2347(c)	9, 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1271

LUIS ANDRES ESQUIVEL-BERRIOS, PETITONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 971 F.2d 26. The opinions of the Board of Immigration Appeals (Pet. App. 22a-26a) and the immigration judge (App., *infra*, 1a-11a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1992. The court of appeals denied a petition for rehearing on November 4, 1992. The petition for a writ of certiorari was filed on January 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Nicaraguan citizen who fled to Honduras and then Guatemala in 1985 at the age of thirteen. He entered the United States without inspection in July of 1988. The Immigration and Naturalization Service (INS) apprehended him on July 21, 1988, near Brownsville, Texas, and initiated deportation proceedings. Pet. App. 5a; Pet. 3-4; App., *infra*, 4a.

2. At his deportation hearing, petitioner conceded that he was deportable and applied for asylum and withholding of deportation. App., *infra*, 4a. In support of his asylum claim, petitioner testified that the Sandinista government seized and forcibly conscripted boys as young as 12. He further testified that he did not wish to serve in the military because he considered the war unjust and did not agree with the Sandinista government. He also stated that he feared that he would be sent to fight without training and that he would be killed or be held as a prisoner of war. Finally, he testified that he feared that he would be shot or imprisoned for avoiding conscription if he returned to Nicaragua. *Id.* at 6a-8a.

At the hearing, petitioner sought a continuance for the purpose of introducing evidence of the State Department's *Country Reports on Human Rights Practices* for Nicaragua. The judge denied the continuance, noting that the date of the hearing had been set six weeks in advance, and that petitioner's counsel had failed to show an adequate justification for failing

to procure his documentary evidence before the hearing. AR 144-145.[1]

The immigration judge denied petitioner's application for asylum and withholding of deportation. App., *infra*, 1a-11a. The judge credited petitioner's testimony (*id.* at 9a), but concluded that it was insufficient to establish that he would be persecuted if he returned to Nicaragua (*id.* at 10a-11a). As the judge explained, the

> sole basis upon which [petitioner] fears returning to Nicaragua is that he fears that he would have to go into the military in that country or [that] if he did not go into the military he would be harmed by the Government of Nicaragua either through physical harm or imprisonment.

Id. at 9a. Relying on the "long accepted position of the Board [of Immigration Appeals] that it is not persecution for a country to require military service of its citizens," *ibid.*, the judge rejected petitioner's claim.[2]

3. Petitioner appealed to the Board of Immigration Appeals. After briefing, the Board dismissed the appeal. Pet. App. 22a-26a. First, the Board took administrative notice "that the Sandinista party no

---

[1] "AR" refers to the certified administrative record of the deportation proceedings.

[2] The judge went on to state that "there is no objective evidence of record * * * that Nicaragua recruits into its military 12 or 13 year olds for military service." App., *infra*, 9a-10a. The judge noted that petitioner did not allege that he received any notice to serve in the military or that he ever was recruited. *Id.* at 10a.

longer controls the Nicaraguan government," explaining that effective April 25, 1990, a coalition of parties opposed to the Sandinistas had taken office following national elections in which Violeta Chamorro was elected president. *Id.* at 23a-24a. The Board also noted that President Chamorro had "announced a general amnesty covering hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription." *Id.* at 24a. Because petitioner's claim of persecution was based on his "fear of conscription by the Sandinistas," *id.* at 23a, the Board found that the record could not support a finding that petitioner had a well-founded fear of persecution, *id.* at 24a.

The Board also rejected petitioner's claim that the immigration judge's denial of his motion for a continuance was error. Pet. App. 25a-26a. First, it agreed with the immigration judge's conclusion that petitioner had failed to show "good cause" for the motion, explaining that petitioner's counsel had entered his appearance six weeks before the deportation hearing and therefore had adequate time to determine what materials he wished to offer into evidence. *Id.* at 25a. Second, the Board concluded that the absence of the *Country Reports* did not prejudice petitioner's asylum claim, because the reports demonstrated only that the Sandinistas conscripted individuals during the years they covered (1984-1985 and 1987-1988); they did not establish petitioner's eligibility for relief after the change of government in Nicaragua. *Id.* at 25a-26a.

4. Petitioner sought review of the Board's decision in the Seventh Circuit. That court consolidated his

petition with petitions filed by Agustin Rhoa-Zamora, Felipe Antonio Juresma-Altamirano, and Luis Rodriguez-Altamirano and affirmed. Pet. App. 1a-21a. As the court of appeals understood petitioner's briefs, petitioner made three arguments: (1) the Board deprived him of due process by failing to accord individualized consideration to his claims; (2) the record did not contain substantial evidence to support the Board's finding that petitioner did not have a well-founded fear of persecution; and (3) even if petitioner would not face future persecution, he was entitled to asylum based on the severity of his past persecution. *Id.* at 18a. The court did not view petitioner as making the argument, advanced by Rhoa-Zamora, that the Board deprived him of due process by failing to give him an opportunity to rebut facts of which the Board took administrative notice. *Id.* at 2a-3a, 18a-20a.[3]

With respect to the due process argument raised by petitioner, the court of appeals acknowledged that the Board had used "boilerplate paragraphs in describing the salient factors involved in its determination." Pet. App. 18a. The court of appeals nevertheless found that a review of the entire decision demonstrated "that the Board's decision contains sufficient indicia of individualized determination to satisfy due process." Pet. App. 18a.

The court also rejected petitioner's substantial evidence argument, reasoning that "[t]he Board's

---

[3] The court of appeals considered that claim and rejected it. Pet. App. 14a-15a. Rhoa-Zamora has challenged that holding in a separate petition, *Rhoa-Zamora* v. *INS*, No. 92-1299, to which we are filing a separate response.

decision is supported by the evidence that was before it at the time it decided [the] case." Pet. App. 19a. The court refused petitioner's request that it evaluate the sufficiency of the evidence in light of new material that petitioner contended would rebut the facts of which the Board took official notice. *Ibid.* The court also declined to remand the case to the Board to require it to consider the new evidence, noting that petitioner was free to file a motion to reopen with the Board as a means to cause the Board to consider the new evidence. *Ibid.* The court concluded its opinion by explaining: "Because such a motion implements a due process right, it must be considered in good faith by the Board. We admonish the Board to consider petitioner['s] motio[n] in that light." *Id.* at 21a (citations omitted).[4]

ARGUMENT

1. Petitioner's principal argument (Pet. 9-22) is that the Board deprived him of due process by "bas[ing] a decision on official notice without warning and an opportunity to present contrary evidence." Pet. 9. Petitioner did not, however, adequately present that claim to the court of appeals, and the court did not consider that claim in denying his petition.[5] As discussed above, petitioner's due process

[4] On petitioner's third argument, the court concluded that petitioner's allegations of past persecution were not sufficiently extreme to justify granting relief in the absence of a finding that he would suffer persecution in the future. Pet. App. 19a-20a. Petitioner has not pressed that argument in this Court.

[5] Petitioner did state in his brief in the court of appeals that "due process requires that [petitioner] be given the opportunity to rebut the BIA's officially-noticed factual findings." Pet.

argument in the court of appeals was that the Board failed to accord individualized consideration to his appeal, not that it deprived him of due process by failing to warn him that it would rely on officially noticed facts. See Pet. App. 18a.[6] Although the court of appeals noted that Rhoa-Zamora raised that argument (*id.* at 3a), the court of appeals did not consider whether petitioner was deprived of due process on that basis.[7] See Pet. App. 18a-20a (discussion of petitioner's claims).

C.A. Br. 41; see *id.* at 43 (arguing that petitioner "is constitutionally entitled to refute the accuracy of these facts"). But those brief statements appeared in the midst of a section pertaining to a statutory claim for relief under 28 U.S.C. 2347 (which authorizes the courts of appeals to remand to require an agency to supplement a record). Moreover, those statements did not clearly suggest the due process claim raised here, that the Board deprived petitioner of due process even if it did give him an opportunity to refute the officially noticed facts (by means of a motion to reopen); in this Court petitioner argues that the Due Process Clause requires *advance* notice, not "the opportunity to rebut" the findings. Pet. C.A. Br. 41. In our view, the court of appeals acted reasonably in concluding that the general scattered references to the Due Process Clause were not adequate to raise this distinct constitutional claim. We have lodged a copy of petitioner's court of appeals brief with the Clerk.

[6] Petitioner did raise a related claim in the court of appeals that the nature of the noticed facts rendered them inappropriate for administrative notice, but he does not advance that claim in the petition. See Pet. 9 n.7.

[7] The absence of any discussion of that argument with respect to petitioner is particularly evident from the portion of the petition arguing that the circuits have reached conflicting results on the question. When petitioner argues that the "court of appeals based much of its reasoning on earlier decisions of

This Court does not ordinarily review a question that was not presented to or passed on by the lower courts. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) (the Court does "not ordinarily consider questions not specifically passed upon by the lower court"); *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991) (Court declines to consider question not presented to the lower courts). That practice ensures both that the lower courts are given a fair opportunity to consider dispositive arguments and that this Court gains the benefit of the lower courts' analysis of the questions it considers. Given the fact-intensive nature of due process analysis in this area, it would be particularly inappropriate for the Court to depart from that practice in this case. Because the question presented by petitioner was not properly preserved, it does not merit review in this case.[8]

---

the [D.C. Circuit and the Fifth Circuit]," Pet. 10, it can only be referring to Pet. App. 14a-15a, a portion of the opinion of the court of appeals expressly addressed to Rhoa-Zamora's claims, not petitioner's.

[8] We summarize our views on the merits of that question in our response to *Rhoa-Zamora* v. *INS*, No. 92-1299, the other petition challenging the judgment of the court of appeals. As we explain there, the Board's treatment of Rhoa-Zamora—who took advantage of the administrative avenue for challenging officially noticed facts—shows that the process developed by the BIA does not deny due process. In that case, the Board evaluated the evidence submitted by Rhoa-Zamora and concluded on the merits that, considered in light of the evidence at the initial proceeding, the evidence did not justify a change in its initial decision. That process adequately addresses the due process concerns raised by petitioner. We are providing petitioner with a copy of our brief in that case.

2. Petitioner also argues (Pet. 22-25) that the court of appeals erred in declining to remand the case to the Board for consideration of additional evidence under 28 U.S.C. 2347(c). We disagree. Section 2347(c) provides only that a court "may," upon satisfaction of the statutory conditions of materiality and cause, "order the additional evidence * * * to be taken by the agency." Nothing in the statute *requires* a court to use the statutory mechanism to secure agency consideration of newly proffered evidence. Hence, the decision of the court of appeals to allow the Board to consider the evidence through its customary reopening procedures—rather than pursuant to a remand under 28 U.S.C. 2347(c)—is not in any way inconsistent with the language of the statute.

Petitioner also errs in arguing (Pet. 23) that the court of appeals has created a conflict in the circuits by "conclu[ding] that Section 2347(c) now is unavailable on review of Board decisions." As the court of appeals explained in its disposition of Rhoa-Zamora's petition, the Seventh Circuit in fact does apply Section 2347(c) to decisions of the Board, and requires a remand whenever "the administrative record is inadequate because the Board has failed without justification to consider newly discovered evidence." Pet. App. 16a (quoting *Osaghae* v. *INS*, 942 F.2d 1160, 1162 (7th Cir. 1991)). In this case, however, petitioner failed to meet that standard, because he "has never given the Board *any* opportunity to consider this evidence." Pet. App. 19a.[9]

[9] Unlike Rhoa-Zamora, petitioner has not filed a motion to reopen to present his new evidence to the Board. See Pet. App. 4a-5a (discussing Rhoa-Zamora's motion to reopen).

Contrary to petitioner's suggestion (Pet. 24-25), the decision of the court of appeals does not conflict with the decision of the Tenth Circuit in *Becerra-Jimenez* v. *INS*, 829 F.2d 996 (1987). In that case, the Tenth Circuit rejected the government's categorical argument that Section 2347(c) was rendered completely inapplicable to Board proceedings by the possibility that the Board would consider new evidence pursuant to motions to reopen. *Id.* at 1001-1002.[10] The Tenth Circuit had no occasion in that case to consider whether a remand would be required in every case in which new evidence was proffered, or whether it would be permissible, as the Seventh Circuit concluded in this case, to rely on the agency's obligation to consider evidence presented by means of motions to reopen in appropriate circumstances.[11] The

[10] The court in *Becerra-Jimenez* suggested that the Ninth Circuit had adopted the government's categorical position barring use of Section 2347(c) in the review of Board decisions. As the Seventh Circuit explained in *Osaghae*, it is not at all clear that the Ninth Circuit's view is as broad as the *Becerra-Jimenez* panel suggested. See *Osaghae*, 942 F.2d at 1162. If subsequent decisions of the Ninth Circuit make it clear that it does follow such a broad rule, the issue might merit review at that time in an appropriate case.

[11] Petitioner's suggestion of a conflict between the Seventh Circuit's decision in this case and the Tenth Circuit's decision in *Becerra-Jimenez* is considerably undermined by the assumption of the *Osaghae* panel (on whose decision the court of appeals relied in this case) that it was following *Becerra-Jimenez*, not rejecting it. See *Osaghae*, 942 F.2d at 1162. The precise scope of the Tenth Circuit's views on the question remains unclear, because the Tenth Circuit has not issued a published opinion involving Section 2347(c) since its 1987 decision in *Becerra-Jimenez*.

courts of appeals that have considered that question generally have concluded, like the Seventh Circuit, that petitioner's absolute rule requiring a remand would be inappropriate, because "in normal circumstances a party asserting new and material evidence should, in the first instance, resort to the [motion to reopen procedures] available under 8 C.F.R. § 3.2, rather than invoking our power under § 2347(c)." *Martinez de Mendoza* v. *INS*, 567 F.2d 1222, 1226 n.9 (3d Cir. 1977); see *Paul* v. *INS*, 521 F.2d 194, 201 (5th Cir. 1975) (declining to remand on the ground that the petitioners could have moved to reopen the proceedings before the Board)[12]; see also *Osaghae*, 942 F.2d at 1162 ("[T]he applicant must first petition the agency to reopen the case.").

In sum, petitioner has not established that any other court of appeals would have applied a categorical rule requiring a remand to the Board under Section 2347(c) even though petitioner had not even attempted to cause the Board to consider the proffered evidence under the Board's own procedures. Accordingly, there is no conflict in the circuits and no occasion for this Court's review.

---

[12] Although a subsequent Fifth Circuit panel in *Coriolan* v. *INS*, 559 F.2d 993 (1977), questioned the *Paul* panel's reliance on motions to reopen, *id.* at 1003, the Fifth Circuit has continued after *Coriolan* to rely on the availability of relief pursuant to a motion to reopen. See *Fleurinor* v. *INS*, 585 F.2d 129, 133 (1978) (declining to grant relief under Section 2347(c); citing *Paul* and noting that petitioner "has declined to pursue th[e] avenue" of a motion to reopen). Accordingly, in our view the Fifth Circuit's decisions do not establish a categorical rule requiring a remand in all cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT KENDALL, JR.
DONALD E. KEENER
Attorneys

APRIL 1993

APPENDIX

IN THE MATTER OF:

LUIS ANDRES ESQUIBEL-BERRIOS RESPONDENT — CASE NO. A28 578 493

IN DEPORTATION PROCEEDINGS — DATE: September 29, 1988

To: Rowena Jones, Esq.
PROYECTO LIBERTAD
110A E. Jackson
Harlingen, TX 78550

Chief Legal Officer
U.S. Immigration and
Naturalization Service
2102 Teege Avenue
Harlingen, TX 78550

INDICIA OF ORAL DECISION

The following is issued pursuant to this Court's Oral Decision on the Record of September 29, 1988 in the above entitled matter.

Based upon the Court's finding that Respondent is deportable on the charge in the Order to Show Cause; and further based upon the Court's decision that Respondent's applications for asylum under Section 208, withholding of deportation under Section 243(h), and voluntary departure under Section 244, of the Immigration and Nationality Act be denied,

IT WAS ORDERED that Respondent in this matter be deported from the United States to Nicaragua pursuant to the charge as contained within the Order to Show Cause.

DETAINED

alleges that respondent is not a citizen or national of the United States but that he is a native and citizen of Nicaragua who entered the United States near Brownsville, Texas on or about July 21, 1988 without being inspected at the border by a United States Immigration Officer. The Order to Show Cause, therefore, charges that respondent is subject to deportation from the United States pursuant to Section 241(a)(2) of the Immigration and Nationality Act (The Act) in that respondent entered the United States without inspection.

On August 17, 1988, respondent through counsel of record admitted allegations 1 through 4 in the Order to Show Cause and conceded deportability as charged therein. That was done on a record of Master Calendar Appearance Form (Exhibit 2). Based upon the admissions and concessions made by respondent through counsel of record to the allegations and charge in the Order to Show Cause the Court finds that deportability as charged in the Order to Show Cause has been established by evidence that is clear, convincing and unequivocal. Respondent declined to select a country for deportation if that were to become necessary and the Court designated respondent's native country of Nicaragua for that purpose.

The respondent sought relief from deportation in the form of asylum, withholding of deportation and in the alternative voluntary departure. Respondent timely filed his application for asylum (Exhibit 3) on Form I-589. An application for asylum made as in this case after the institution of deportation proceedings shall also be considered as an application for withholding of deportation under Section 243(h) of the Act.

Pursuant to the regulations, a copy of the Form I-589 was forwarded to the State Department Bureau of Human Rights and Humanitarian Affairs in order to

seek an advisory opinion. The Court received from the Department of State a response dated September 2, 1988, wherein the State Department stated that the Department of State Bureau of Human Rights and Humanitarian Affairs has no factual material about this specific applicant. It referred the parties to the State Department's Country Reports on Human Rights Practices. That State Department response, as required by the regulations, was placed in the record (Exhibit 4). However, the Court is not giving that document any evidentiary weight in this proceeding. Further the Court does not consider it as a positive or negative evaluation, recommendation or advisory opinion with respect to respondent's applications for asylum or Section 243(h) withholding of deportation. In addition, the Court has not referred to the State Department's Country Reports on Human Rights Practices as that has not been offered into evidence by either party.

Statement of the facts

The relevant facts in this case and the sole evident[i]ary bases for this Court's decision come from respondent's asylum application, respondent's testimony at the deportation hearing as well as the questions asked upon cross examination by the Service as part of that testimony.

Respondent is 17 years of age. He is from the Department of Chinandega in the country of Nicaragua. Respondent has a father, mother and two brothers who live in Nicaragua at this time. Respondent also has another brother who is currently living in Guatemala. Respondent attended school for six years, five of those in Nicaragua and one and a half years in Guatemala. Respondent did not work while in Nicaragua because he was studying at the time. Respondent is Catholic and he attended church

services in Nicaragua when he lived there on Sundays with his family. Respondent's parents are also Catholic.

Respondent testified that life for him was very hard in Nicaragua. He testified that he did not agree and he does not agree with the politics of the Government of Nicaragua such as obligatory military service and also the manner in which the Government is run. He testified that the Government of Nicaragua and its policies have affected him because a person is drafted into obligatory military service where he is placed to fight for a cause that he does not consider just. Respondent testified that there is a war going on at this time in Nicaragua and that he knows this by reading newspapers. However, he does not know whether the war was taking place in or near Chinandega because he left Nicaragua in February of 1985. It was respondent's testimony that even when he left Nicaragua there was obligatory military service and persons were made to spend 40 years in the army. He testified that he has been in recent contact with his family through his brother in Guatemala and has been told that they say that life is hard in Nicaragua in that there is not enough food for the people there. Respondent testified that he does not know how the military in Nicaragua treats the civilian population in Nicaragua and that he did not know that either when he was in the country.

He testified that he does not want to fight in the army in Nicaragua because he does not like to kill people or fight in the way that the Nicaraguan Army fights. He testified he does not want to fight with the military of his country because he does not agree with the Government. It was his testimony that he decided to leave Nicaragua in 1985, because the situation was becoming worse and worse each day and

he believed that if he stayed he would be sent to fight without training and he would be killed or become a prisoner of war. He testified that he thought at that time that he would be drafted because he was 12 years old and he understood that persons 12 and 13 years old were drafted into the military. He testified that he knows boys 12 or 13 years old who were drafted.

Respondent left Nicaragua in 1985, spent 15 days in Honduras and then went to Guatemala where he remained for three and a half years. He stayed there receiving help from an adult friend of his, and also with the help of respondent's brother. Respondent initially had permission to study. However, due to a job that he had, he could not go to school any longer. Respondent did not have work permission. Since he was no longer studying he lost his permission to be in Guatemala and spent the last one and a half years in Guatemala without legal documents to be there. He testified that he was afraid that being illegally in Guatemala he may be deported to Nicaragua and that is why he left to come to the United States.

Respondent testified that he believes that if he were sent to Nicaragua at this time he would be shot or put in jail for ten or twenty years because they would believe that he was unpatriotic.

Respondent testified that his brother in Guatemala does not have any legal status to be there and also does not have work permission. Respondent was working in Guatemala. However, he also had no work permission there.

It was respondent's testimony that the main reason he does not want to return to Nicaragua is that he does not want to serve in the military. He testified he does not know the age requirements for the draft in Nicaragua. Respondent testified he does not know anybody who was shot or imprisoned upon returning

to Nicaragua but he believes that that would happen because the Government will know that he did not want to stay in that country. Respondent did not receive a notice to report to the military in Nicaragua prior to his departure. Further he testified that his brother Jose who is in Nicaragua is 21 years old and he was drafted into the military in Nicaragua about two years ago.

Conclusions of law

The applicant bears the evidentiary burdens of proof and persuasion in any application for withholding of deportation under Section 243(h) or asylum under Section 208 of the Act. To be eligible for withholding of deportation pursuant to Section 243(h) an alien's facts must show a clear probability of persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social group or political opinion. This means that the alien's facts must establish that it is more likely than not that he will be subject to persecution for one of the grounds specified.

To be eligible for asylum under Section 208 of the Act an alien must meet the definition of a "refugee", which requires him to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group or political opinion. The burden of proof required to establish eligibility for asylum is lower than that required for withholding of deportation. See *INS* v. *Cardoza-Fonseca*, 107 Supreme Court 1207 (BIA 1987). An applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution for one of the five grounds specified in the Act. See *Matter of Mogharrabi* interim dec. 3028 (BIA 1987); see also *Guevara-Flores*

v. INS, 786 2d [*sic*] 1242 (5th Cir. 1986). Further asylum unlike withholding of deportation may be denied in the exercise of discretion to an alien who establishes statutory eligibility for the relief. see [*sic*] *Matter of Pula* interim dec. 3033 (BIA 1987).

The Court finds that respondent was a credible witness in the deportation proceeding. His testimony was direct and forthright with respect to events that happened to him. The court also finds that respondent was testifying truthfully as to his beliefs and as to what he feared might happen to him. Respondent's testimony was consistent throughout.

The Court finds that respondent has not met his burden to show that he is eligible for asylum under Section 208 of the Act or for withholding of deportation under Section 243(h) of the Act. Respondent's sole basis upon which he fears returning to Nicaragua is that he fears that he would have to go into the military in that country or if he did not go into the military he would be harmed by the Government of Nicaragua either through physical harm or imprisonment. In *Matter of A-G-*, Interim dec. 3040 (BIA 1987) the Board of Immigration Appeals held that it has been the long accepted position of the Board that it is not persecution for a country to require military service of its citizens. The Board held that there are exceptions to this rule that may be recognized in those cases where a disproportionately severe punishment would result on account of one of the five grounds enumerated in Section 101(1)(42)(A) of the Act or where the alien would necessarily be required to engage in inhuman conduct as a result of military service required by the Government.

Upon a careful review of the record, the Court finds that there is no objective evidence of record either

through respondent's testimony or otherwise that Nicaragua recruits into its military 12 or 13 year olds for military service. Respondent did not receive any notice to serve in the Nicaraguan Military when he was there nor was he ever recruited while there. The record does not reflect any specific evidence to show that boys 12 or 13 years old were drafted into the Nicaraguan Army, or that respondent would be punished in Nicaragua if returned for failure to serve in the Nicaraguan Army prior to his leaving that country in 1985. Although respondent did state that he knows of boys who were drafted at age 12 or 13 he did not provide any specific information as to who and under what circumstances. Respondent certainly may be required to serve in the Nicaraguan military if returned there at present and he may be convicted of a crime and jailed if he refuses to serve. However, under *Matter of A-G-, Supra*, that is not considered persecution within the meaning of the Act. In addition the respondent has not shown by objective record evidence either through his testimony or otherwise that he would receive disproportionate punishment for failure to serve in the military or that in military service in Nicaragua he would be required to violate international legal standards. Any speculations by respondent or conclusional testimony by him in the record in this regard is not sufficient to prove that he is eligible for asylum or Section 243(h) withholding of deportation. Respondent presented no objective evidence either in his testimony or otherwise to show that he would be shot or that he would be kept in jail for a very lengthy period of time.

Based upon all of the above, this Court concludes that respondent has not met his burden to show that there is a clear probability that he would be persecuted in Nicaragua within the meaning of the Act,

nor has he shown that a reasonable person in his circumstances would fear persecution as that term is defined in the Act. Simply because respondent does not agree with the policies of his government, that is no reason to find that the requirement that he serve, or any conviction for failure to serve, in the military would be persecution.

Respondent presented no record evidence as to his eligibility under either Section 244(e) of the Act or the applicable regulations for voluntary departure in lieu of deportation. Therefore, that alternative request for relief will also be denied.

ORDER

IT IS HEREBY ORDERED that respondent's applications for asylum under Section 208, withholding of deportation under Section 243(h), and voluntary departure under Section 244(e), of the Act be denied.

IT IS FURTHER ORDERED that respondent be deported from the United States to Nicaragua pursuant to the charge of deportability as set forth in the Order to Show Cause.

/s/

HOWARD ACHTSAM
Immigration Judge

8/28/89

3 9

No. 92-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUIS ANDRES ESQUIVEL-BERRIOS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

TABLE OF CONTENTS

Page

I. THE DUE PROCESS ISSUE WAS FULLY RAISED BY PETITIONER AND DECIDED BY THE COURT OF APPEALS AND IS PROPERLY BEFORE THIS COURT 2

II. THE COURTS OF APPEALS ARE IRRECONCILABLY IN CONFLICT ON EACH OF THE QUESTIONS PRESENTED 5

III. THE CONFLICT AMONG THE CIRCUITS IMPLICATES FUNDAMENTAL CONSTITUTIONAL ISSUES CRITICAL TO THE ADMINISTRATION OF FEDERAL LAW 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases — Page

Acewicz v. INS, 984 F.2d 1056 (9th Cir. 1993) 5

Becerra-Jimenez v. INS, 829 F.2d 996 (10th Cir. 1987) 7

Bernal-Garcia v. INS, 852 F.2d 144 (5th Cir. 1988) . . . 7

Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992) . . . . . *passim*

Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977) 7

Dolores v. INS, 772 F.2d 223 (6th Cir. 1985) 7

Gomez-Vigil v. INS, ___ F.2d ___, 1993 WL 84945 9th Cir. March 26, 1993) 5, 8, 9

Osaghae v. INS, 942 F.2d 1160 (7th Cir. 1991) 6

Ramirez-Gonzalez v. INS, 695 F.2d 1208 (9th Cir. 1983) 6

Sivaainkaran v. INS, 972 F.2d 161 (7th Cir. 1992) 5

Stevens v. Department of Treasury, 111 S.Ct. 1562 (1991) 3

Ulloa v. INS, 944 F.2d 905 (6th Cir. 1991) (Table), at App. 27a-30a, *infra* 1, 5

United States v. Williams, 112 S.Ct. 1735 (1992) 3

Virginia Bankshares, Inc. v. Sandberg, 111 S.Ct. 2749 (1991) 3

Statutes, Rules and Regulations

28 U.S.C. § 2347(c) 3, 4, 6, 7

8 C.F.R. § 3.2 7

REPLY BRIEF FOR THE PETITIONER

In our certiorari petition, we demonstrated that there is an irreconcilable conflict among the circuits concerning whether the Due Process Clause prohibits the Immigration and Naturalization Service ("INS") from basing a decision to deny asylum on official notice of hotly-disputed facts without giving the applicant any prior warning or opportunity to present contrary evidence. In its brief in opposition, the INS does not address the compelling need for review of this serious constitutional issue. Instead, the INS claims that even though the court of appeals expressly decided the due process issue, somehow that issue was not properly preserved. The INS's argument is frivolous; not only was that issue presented to the court of appeals and vigorously litigated by both sides, but it was specifically decided by that court as to petitioner.

The INS's brief in opposition in *Rhoa-Zamora v. INS*, No. 92-1299, effectively concedes that the due process issue raised in our petition warrants review.[1] In *Rhoa-Zamora*, the INS acknowledges the circuit split, but opposes certiorari on the basis of purported jurisdictional defects in *Rhoa-Zamora* that are *not* present here. Indeed, the INS has not challenged the fact that the decision of the court of appeals below with respect to petitioner is indistinguishable from that of the Ninth Circuit in *Castillo-Villagra* and the Sixth Circuit in *Ulloa*. What is more, subsequent court of appeals' decisions confirm that the split will only continue to deepen. These decisions demonstrate the compelling need for immediate resolution of this conflict by the Court.

---

[1] The certiorari petitions in this case and in *Rhoa-Zamora* arise from the same consolidated opinion of the Seventh Circuit. The INS filed its brief in opposition to each petition on the same day and we anticipate that the Court will consider the petitions together.

I. THE DUE PROCESS ISSUE WAS FULLY RAISED BY PETITIONER AND DECIDED BY THE COURT OF APPEALS AND IS PROPERLY BEFORE THIS COURT

The INS contends that the due process issue presented in the petition was not properly raised in the court of appeals and thus not appropriate for review by this Court. That is simply incorrect. The court of appeals expressly decided the issue, and it was properly presented by petitioner to that court.

The INS's assertion that "the court of appeals did not consider whether petitioner was deprived of due process" (Br. in Opp. 7) through its use of official notice is wrong. As explained in the petition (at 6-8), the court of appeals first held in the course of addressing the claims of Rhoa-Zamora that "due process does not require the Board to give an asylum applicant the opportunity to rebut noticed facts prior to reaching a decision." Pet. App. 14a. The court then specifically applied that holding to petitioner's claim and held that his due process rights were satisfied by his ability to file a discretionary motion to reopen with the Board:

> Because the Board did not provide Berrios with an opportunity to rebut the noticed facts prior to deciding his case, Berrios has a due process right to have [his rebuttal] evidence considered. *Kaczmarczyk*, 933 F.2d at 597. In order to do so, however, he must file a motion to reopen with the Board. *Id.*

Pet. App. 19a. Petitioner's due process issue -- whether the INS violated the Due Process Clause by denying his asylum claim based solely on administrative notice of adjudicative facts without prior notice or the opportunity to present contrary evidence -- is derived from this quoted language in the court of appeals' decision.

This Court has long held that a question is properly presented for review if that question was actually decided by the court of appeals. As explained most recently in *United States v. Williams*, 112 S.Ct. 1735 (1992):

> Our traditional rule * * * precludes a grant of certiorari only when "the question presented was not pressed or passed upon below." That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions.

Id. at 1738-39, citing *Stevens v. Department of Treasury*, 111 S.Ct. 1562, 1567 (1991); *Virginia Bankshares, Inc. v. Sandberg*, 111 S.Ct. 2749, 2761 n.8 (1991). Accordingly, the Court need go no further to conclude that the due process issue is properly before the Court.

In any event, the INS's claim that petitioner failed to argue in the court of appeals that the Board's use of official notice violated due process is also incorrect. Petitioner's brief specifically argued that "due process requires that Berrios be given the opportunity to rebut the BIA's officially-noticed factual findings," that "because the BIA gave no prior notice that it intended to rely entirely upon facts which were not contained in the record," and because the Board "focused upon events which had not even occurred before the parties' briefs were filed and submitted for decision," "Berrios is constitutionally entitled to refute the accuracy of [the Board's officially noticed] facts." Pet. C.A. Br. 41-43.[2] Petitioner also argued

---

[2] The INS also fails to inform the Court that petitioner filed a motion for leave to adduce additional evidence pursuant to 28 U.S.C. § 2347(c) in which he (along with the other petitioners) argued that the Board's use of official notice violated the Due Process Clause and that a remand was required under Section 2347(c). The INS in turn responded to this

that reopening mechanisms at the Board would not provide him with an adequate method of rebutting the Board's officially noticed findings and that the only proper remedy would be to vacate the Board's decision and remand the proceedings pursuant to 28 U.S.C. § 2347(c). *Id.* at 46-47. These are the precise arguments now presented in the petition and plainly were preserved by petitioner for review.

In the particular context of this case, the INS's assertion that review would be inappropriate borders on the disingenuous. The court of appeals' opinion decided three consolidated cases. *Juresma-Altamirano v. INS*, No. 91-1513; *Esquivel-Berrios v. INS*, No. 91-1551; and *Rhoa-Zamora v. INS*, No. 91-1949. In its Order consolidating the cases, the court of appeals told the parties to avoid duplication of issues in their briefs, and sternly warned that "[d]uplicative briefing will be stricken and may result in disciplinary sanctions against counsel." Court of Appeals' Order of May 15, 1991. In light of those instructions, the parties coordinated their briefing. Petitioner raised the due process issue, but concentrated his briefing on other issues; the brief filed by Rhoa-Zamora emphasized the due process points. The INS's brief then fully explored the due process issues as to all of the parties (without any claim that the issue had been waived by any party), and the court examined and decided the due process issue as to all of the parties.[3]

Because the due process issue was fully briefed in the court of appeals and was expressly decided by that court, none of the prudential concerns that might cause the Court to hesitate to

---

substantive issue. The court of appeals informed the parties that it would consider the issues raised by the motion along with the parties' merits briefs. Copies of these pleadings are being lodged with the Clerk's Office.

[3] We have lodged copies of the court of appeals briefs filed by Rhoa-Zamora and the INS with the Clerk.

review an issue decided by a lower court without the benefit of full briefing exist in this case. In light of the court of appeals' warning against duplicative briefing, and the facts that petitioner raised the due process issue, the issue was fully briefed by both sides and decided by the court, it would be inequitable in the extreme to deny review because the petitioner heeded the court of appeals' warnings and did not dedicate more of his brief to the due process issue.

II. THE COURTS OF APPEALS ARE IRRECONCILABLY IN CONFLICT ON EACH OF THE QUESTIONS PRESENTED

1. The INS does not dispute the conflict among the circuits on the due process issue. To the contrary, the INS's brief in opposition in *Rhoa-Zamora* acknowledges (at 8-9), as it must, that the decisions of the Ninth Circuit in *Castillo-Villagra v. INS*, 972 F.2d 1017 (1992) and the Sixth Circuit in *Ulloa v. INS*, 944 F.2d 905 (1991), reprinted at Pet. App. 27a-30a, are irreconcilably at odds with the decision of Seventh Circuit in this case and those of the Fifth and District of Columbia Circuits as well. What is more, subsequent decisions of the Seventh and Ninth Circuits confirm that the conflict on the due process issue will only continue to deepen. See *Gomez-Vigil v. INS*, ___ F.2d ___, 1993 WL 84945 (9th Cir. March 26, 1993) (following *Castillo-Villagra*); *Acewicz v. INS*, 984 F.2d 1056 (9th Cir. 1993) (same); *Sivaainkaran v. INS*, 972 F.2d 161 (7th Cir. 1992) (following holding below).[4]

---

[4] In opposing certiorari in *Rhoa-Zamora*, the INS relies entirely on jurisdictional issues and factual distinctions that are *not* applicable here. *First*, the INS argues that certiorari should be denied there because of a threshold jurisdictional issue that clearly is not present here. See *Rhoa-Zamora* Br. in Opp. 5-6. *Second*, the INS claims that *Rhoa-Zamora* is factually distinguishable from decisions of other circuits because Rhoa-Zamora filed a motion to reopen at the Board and because that motion was denied. *Id.* at 6-8. Once again, that distinction is inapplicable here given

The INS argues in *Rhoa-Zamora*, however, that the conflict among the circuits here is insignificant because all of the circuits are in agreement that the Due Process Clause guarantees an opportunity to rebut officially noticed facts. *Rhoa-Zamora* Br. in Opp. 10. But this argument entirely begs the question because the conflict raised in the petition concerns an application of that indisputable principle, *i.e.*, whether the Due Process Clause requires a prior opportunity to present rebuttal evidence or whether discretionary reopening mechanisms at the agency level are constitutionally sufficient.

2. The INS's effort to explain away the conflict among the circuits on the second question presented is belied by a plain reading of the court of appeals' decision which expressly acknowledged the conflict it had created. Pet. App. 17a & n.9. The INS concedes that the court of appeals held that Section 2347(c) relief cannot be granted where reopening mechanisms are available at the Board. Pet. App. 16a-17a. But the INS points to the Seventh Circuit's decision in *Osaghae v. INS*, 942 F.2d 1160 (1991) as proof that "the Seventh Circuit in fact does apply Section 2347(c) to decisions of the Board." Br. in Opp. 9.

However, the Seventh Circuit's decision in this case limited *Osaghae* "to situations in which the Board 'has acted improperly' in preventing an asylum petitioner from placing evidence before it." Pet. App. 16a. On the question presented in this case, the court agreed with the Ninth Circuit and held that Section 2347(c) relief is not available when discretionary reopening mechanisms exist at the agency level. See *Ramirez-Gonzalez v. INS*, 695 F.2d 1208 (9th Cir. 1983). *Contra*

---

that petitioner, like the applicants in *Castillo-Villagra* and *Ulloa*, did not file such a motion. The INS thus has provided no basis for denying our petition on the merits.

Becerra-Jimenez v. INS, 829 F.2d 996 (10th Cir. 1987); *Dolores v. INS*, 772 F.2d 223 (6th Cir. 1985); *Bernal-Garcia v. INS*, 852 F.2d 144 (5th Cir. 1988).[5]

The INS's effort to distinguish the Tenth Circuit's decision in *Becerra-Jimenez v. INS*, 829 F.2d 996 (1987) on the ground that it "had no occasion in that case to consider whether a remand would be required in every case in which new evidence was proffered" (Br. in Opp. 10) misses the point entirely. As quoted in the petition (at 24-25), the Tenth Circuit expressly held that the reopening mechanisms contained in 8 C.F.R. § 3.2 can in no way limit an applicant's right to seek a remand under Section 2347(c). In the words of the INS, the court "rejected the government's categorical argument that Section 2347(c) was rendered completely inapplicable to Board proceedings by the possibility that the Board would consider new evidence pursuant to motions to reopen." *Ibid.* Yet, the Seventh Circuit here reached precisely the opposite result and *accepted* the "government's categorical argument" by holding that petitioner could not seek a remand under Section 2347(c) given the reopening mechanisms at the Board. See Pet. App. 16a-17a. Indeed, the court acknowledged this conflict in its decision. Pet. App. 17a n.9 (noting that unlike this case, "[o]ther circuits have held without reference to improper action that remand may in certain circumstances be appropriate").

---

[5] The INS's claim (at 5 n.12) that the law of the Fifth Circuit in this area is unclear is wrong. In its most recent ruling, *Bernal-Garcia v. INS*, 852 F.2d 144 (1988), the Fifth Circuit ordered a remand under Section 2347(c) without regard to the fact that the petitioner in that case had not filed a motion to reopen. In doing so, the court of appeals reaffirmed its prior ruling in *Coriolan v. INS*, 559 F.2d 993 (1977), rejecting the view that reopening mechanisms at the Board must be pursued in the first instance. *Bernal-Garcia*, 852 F.2d at 147 ("we apply *Coriolan*'s principles to this case and remand [under Section 2347(c)] for reconsideration of Bernal's claims in light of [the newly-adduced evidence]").

III. THE CONFLICT AMONG THE CIRCUITS IMPLICATES FUNDAMENTAL CONSTITUTIONAL ISSUES CRITICAL TO THE ADMINISTRATION OF FEDERAL LAW

Recent decisions of the courts of appeals illustrate the great practical and constitutional significance of the questions presented for virtually all forms of agency adjudication. While the INS contends that "[t]he practical difference between the rules of the various circuits * * * is quite minimal at this time" (*Rhoa-Zamora* Br. in Opp. 11), even those judges who support the INS's position fervently disagree with this view and acknowledge the critical need for immediate resolution of the conflict among the circuits on this issue.

In *Gomez-Vigil v. INS*, ___ F.2d ___, 1993 WL 84945 (9th Cir. March 26, 1993), the court of appeals reaffirmed its earlier due process holding in *Castillo-Villagra*. Judge Aldisert, sitting by designation, wrote a separate concurrence sharply criticizing the holding in *Castillo-Villagra* and emphasizing the fundamental constitutional issues that are at stake and their applicability to all forms of agency adjudication:

> The legal precept underlying *Castillo-Villagra* is not limited to INS administrative law. The decision has powerful precedential authority. It was not an airline super-saver excursion ticket good for this day and flight only. Because the panel bottomed its decision on constitutional law, it has a serious potential as a precedent--at least in this judicial circuit--to disturb the long-standing, recognized practice of federal agencies to take administrative notice of facts, and to draw inferences from those facts, a practice authorized by Congress and a host of federal regulations. I feel it necessary to repeat that although INS lawyers decided not to ask for en banc reconsideration or to file a petition for certiorari, this does not mean that *Castillo-*

> *Villagra* is an interpretation of immigration law only; it is a flat, if not imperial, statement of constitutional law. . . . [I]t has a potential effect on all agencies regulated by the Administrative Procedure Act (APA) at least in this judicial circuit. . . . This is strong medicine. And the ramifications could be widespread.

Gomez-Vigil, 1993 WL 84945, at *14 (Aldisert, J., concurring). Judge Fletcher also filed a separate concurrence emphasizing her support for the holding in *Castillo-Villagra*.

Petitioner disagrees with Judge Aldisert on the merits of the issues presented by this case. But his analysis of the importance of the constitutional questions is undeniably correct. This Court should grant the petition to resolve the conflict among the circuits on these important issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

April, 1993